THE REFERENDUM IN AMERICA

TOGETHER

WITH SOME CHAPTERS ON THE HISTORY OF THE INITIATIVE AND OTHER PHASES OF POPULAR GOVERNMENT IN THE UNITED STATES

BY

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PREFACE

THE names, the initiative and the referendum, have been known, of course, to a few students of government in this country and England for many years. It is, however, within only a very short time that these terms have conveyed a meaning even to otherwise intelligent and well informed men. The governments of the Swiss cantons were little understood by foreigners and it was not until the system of referring laws to popular vote was introduced into the practice of the Confederation that the subject began to claim anything like general consideration in the English speaking world. As for myself, I cannot remember that very much that was definite was known of this interesting democratic institution prior to the appearance of a popularly written work on the Swiss Confederation in 1889 by Sir Francis O. Adams, long the British Minister at Berne, and Mr. C. D. Cunningham. This book stated discussion in this country, and it soon came to be recognized that law-making by the people was also no strange thing in the United States. Mr. James Bryce referred to the subject in a chapter in "The American Commonwealth" and during the ten years past this feature of the Swiss and American political systems has become familiar to a constantly widening circle of Americans.

Our own experience with the referendum was brought to the notice of readers in university circles by the publication in 1891 of my essay on "Law Making by Popular Vote," by the American Academy of Political and Social Science, which was followed in 1893 by a somewhat more detailed treatment of the subject in a Monograph on the Referendum, included in the publications of the University of Pennsylvania, Political Economy and Public Law Series. These studies, though

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appealing necessarily to a rather narrow interest were so kindly received by students of political institutions in this country, England and France that it has encouraged me after these seven years to return to the subject in the present work.

Although my earlier studies regarding the referendum have furnished the frame for some of the chapters of the present volume every sentence, I think, is new and many of the facts are from sources which were then but barely tapped. I cannot flatter myself with the hope that such a recital will be interesting reading to every one, but I have made an effort to keep it from being too dry and insipid to the general taste.

In seven years very great advances have been made in the development of the direct principle in law-making not only in this but also in other lands. Mr. Bryce, Mr. W. E. H. Lecky, Prof. A. V. Dicey, Mr. A. L. Lowell, Mr. E. L. Godkin and many other writers on constitutional subjects have carefully and attentively noted these manifestations in our political life; and indeed in all countries where representative government has been tested and its weaknesses have been revealed the system of law-making by direct popular vote has come to claim a large share of public interest.

The question of introducing the referendum into Belgium was seriously discussed during the recent constitutional controversy which preceded and accompanied the revision of the organic law of that kingdom. More recently it has engrossed public attention in Australia in connection with the movement to unite and federate the various Australian colonies.

Coincidently the subject has rapidly gained a place for itself in Socialist and Labor party platforms in Europe and America. In the United States the demand that the people should have a larger share in the making of the laws has spread over a great area and through many strata of the population. In most of the Western States the referendum has been taken up with zeal by the advocates of radical social reforms in the belief that it is only the representative system which stands between them and the realization of

their ideals. Seeing the light first in the political program of the "Farmers' Alliance" the referendum made its way into the platforms of the so-called "Peoples' Party", which polled a very large popular vote until its principles, the referendum with the rest, were transferred almost bodily to the platforms of the Democratic party. Not a few societies and leagues exist for the purpose of advancing this reform, in the East as well as in the West, and there are not many parts of the country where the referendum is now a strange name even to the common man. That the education of the people respecting such a subject is, in a way, a gain in a democracy it is not possible to doubt, and it leads one to hope that a question so vitally affecting our constitutional system may be still more deeply examined into so that a true idea may be secured as to the worth of the referendum in contrast with the older representative type of government which is the heritage of the Anglo-Saxon race. If, in this work, I shall succeed in doing ever so little to make the issue clearer in the minds of those to whom the book may come, I shall feel it an abundant recompense for my somewhat tedious labors among the law books of the American States.

It should be explained that the first two chapters of this work are the result of a study undertaken long ago in another connection when I had hoped that the engagements of life would permit me to complete a constitutional history of the State of Pennsylvania, in the preparation of which I had made more than a beginning. I think, however, that it can not be wholly inappropriate to incorporate these chapters in this volume since they illustrate some phases of popular government in America of which we all have need of being occasionally reminded. These initial chapters will serve, I hope, as an historical background for those which follow, and will tend, perhaps, to a better understanding of some developments in the political experience of the United States of a later time. Lest in these chapters I should be accused of partisanship against Dr. Franklin and in favor of John Adams, which is a fate that has been met by not a few

writers before me, I wish in advance to disclaim any such intention of prejudice. The student who looks for his sources in regard to this subject will find many of the most valuable of them in John Adams' " Works ", and Mr. Adams' theories have found their justification in the course of later events while Dr. Franklin's were discredited long ago. There is no desire on the part of this author to take away anything from Franklin's glory in any direction or to make his figure appear in any other than an historically correct light. The historian has accorded him a high place among his compeers and my only aim here has been to investigate the course of his life as it bears upon political science, in which respect he was, I think, a mistaken adviser of his fellow men.

I wish sincerely to thank my preceptors and friends at the University of Pennsylvania, under whose inspiration this work was begun, while I was still a student in that institution, for their interest and advice during the progress of these studies. I desire particularly to name Prof. Edmund J. James, the President of the American Academy of Political and Social Science, earlier of the University of Pennsylvania, but now of the University of Chicago; Prof. Simon N. Patten, of the University of Pennsylvania, and Prof. John Bach McMaster, of the University of Pennsylvania.

I wish, too, to acknowledge the great courtesy of the officers of the Pennsylvania Historical Society and of the Law Association of Philadelphia, whose valuable collections I have constantly referred to while engaged in the preparation of these chapters.

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THE REFERENDUM IN AMERICA

The Referendum in America

CHAPTER I

THE INTERPLAY OF FRENCH AND AMERICAN THOUGHT IN THE EIGHTEENTH CENTURY

THE leaven of political unrest which pervaded the populations of both Europe and America in the latter half of the eighteenth century, was responsible for a number of peculiar results. In all the forms, suggested and actual, at this time, however, popular government does not seem to have passed through the phase of allowing the people to vote directly by yeas and nays upon their laws, or even upon their constitutions, though we find evidences of this in respect of the latter case, in two of the New England States, and somewhat later in France in the Revolutionary Constitutions [1] of that fateful period when institutions and traditions in that country were being swept from their moorings in a storm of revolt from which the whole of Europe barely made its escape.

The influence which J. J. Rousseau exerted upon the progress of political events in America, has lately been made the subject of an interesting examination by Prof. Jellinek, of Heidelberg, and the results arrived at have the effect of reversing some pretty well-grounded opinions on this point.[2]

He attempts to show that the tendency, at this time, was

[1] *Adoption and Amendment of Constitutions in Europe and America*, by Chas. Borgeaud, Hazen's translation, New York, 1895, pp. 199, 200; Lecky, *Democracy and Liberty*, 1896, Vol. I, p. 277.

[2] See Jellinek, *Die Erklärung der Menschen-und Buergerrechte*, Leipzig, 1895.

from America to France, rather than in the other direction. In so far as the Bills of Rights in the various State Constitutions[3] are concerned, beginning with Virginia's, the case is probably well made out, and it would appear, quite a long time ago. There is not a particle of doubt that the French Declaration of the Rights of Man was helped to its concrete form by the American Declarations of Rights, but it would be a serious mistake were we altogether to disregard Rousseau's influence in this connection. Certainly the play of ideas of one country upon those of the other was at least mutual, and knowing this, as we do, it becomes an interesting field of historical study. It is a period of the highest importance in the constitutional experience of America and France.

In the *Contrat Social,* Rousseau brought to expression sentiments that millions of men were beginning to feel. As the philosopher of equality, of a social system in which age, sex, property, knowledge, were of little weight in comparison with the demands of nature, fantastically worked out and catalogued in an *a priori* way, he was the spokesman for great numbers of people. "Taking men such as they are, and laws such as they may be made,"[4] Rousseau planned his scheme of government, and yet to a degree beyond any other writer of his time, he it was, perhaps, who took men not as they were, but as they were not.

In the state in which the system of the *Naturrecht* was exemplified in its perfect form, the people were to assemble and sanction their own laws. Jean Jacques gives us his views on this point in terms not to be mistaken:[5] "The sovereign having no other force but the legislative power, acts only by the laws; and the laws being only the authentic act of the general will (*volonté generale*), the sovereign can never act but when the people are assembled. Some will perhaps think that the idea of the people assembling is a mere chimera, but if it is so now, it was not so two thousand years ago; and I should be glad to know whether men have changed in their

[3] Borgeaud, *op. cit.*, pp. 15 *et seq.*
[4] *Oeuvres,* Geneva, 1782, Tome II, p. 3.
[5] *Op. cit.*, p. 156.

nature." He tells us that the people of Rome assembled in the Capitol, and here exercised their sovereign authority, and that at remoter times the Greeks, the Macedonians and the ancient Franks held councils of the people. He seems not to have known of the survival of the folk-mote in some of the Swiss cantons, where the *Landsgemeinde* was still a prevailing institution, as it is to-day, nor of the town-meeting in the New England Colonies, his philosophy needing little support drawn from the world about him.

Representative government with him was an evil, necessary sometimes no doubt, but only to be tolerated,—never to be cordially admired. Legislatures were a mark of political degeneracy. They resulted from a declination of patriotism, in this sense—that the people had become unwilling or indisposed longer to attend to their own affairs. There was bred an activity of private interest, the people refusing to give of their time to society, and their direct participation in law making was made difficult also by the immense extent of dominions, a tendency to be deplored since the government thus became undemocratic. The representative system was brought on by the abuse of government generally; it was not the outgrowth or expression of the natural political condition.[6] Deputies were not the representatives of the people. They could only be regarded as their commissioners. They were not qualified to conclude upon anything definitively. "No act of theirs," said Jean Jacques, "can be a law unless it has been ratified by the people in person; and without that ratification nothing is a law."[7]

One cannot conceive of Rousseau being other than a rather passionate advocate of the system of submitting laws to popular vote, were he with us to-day, though without a ballot system, which has been a development of more recent years, the possibility of a plebiscite that could serve as a substitute for a council of the people does not seem to have suggested itself to the French philosopher. He did not hesitate to declare that the happiest people in the world, in his own view, were

[6] *Op. cit.*, p. 165. [7] *Ibid.*

"a company of peasants sitting under the shade of an oak", conducting the affairs of the nation "with a degree of wisdom and equity that do honor to human nature".[8] To say that a writing of this kind passed without its influence in America in the years prior to and during the Revolution, is, it would appear, a grave historical error. In America as well as in Europe, these theories (it may be admitted that they were not Rousseau's in particular, he being but the writer who expressed them earliest and most pleasingly) soon struck deep root. The *Contrat Social* was well known to the Americans, or at any rate, to the pamphleteers and newspaper writers among them, who were busily engaged with the subject of government, arousing a popular interest in this branch of knowledge, which would do great credit to the American democracy in this later time.

Although British tendencies in respect of government were strong in the colonies, there was a conviction among the masses everywhere that men were little better for their wealth, their birth or even for their training and education. These democratic sentiments were held more obstinately in the frontier districts than in the large cities, and more strongly too in parts where the holdings in land were small, than where they were of larger size. The idea was spread far afield, and the belief took an intenser form as the breach between England and America widened, and the seeds of discord were sown, men aligning themselves in increasing numbers in favor of resistance, independence and the war. If inequality were English, then it was the more unsuitable for the American patriots. It must be discarded. A new political scheme must be sought out. There must be a turning toward France where was held a more liberal philosophy, which would afford the people sympathy in their struggles accompanied by an affiliation in sentiment, which was the more to be cultivated a little later, when French volunteers enlisted in the Continental army, and a political alliance between the nations was definitively established.

[8] *Op. cit.*, pp. 179-80.

It was a question which the leaders of the Revolution in America had early to discuss,—with the abolition of the colonial governments what should come next? What should follow the old political order? Should independence from England, the declared equality of men which we find in that famous writing bearing the date of July 4, 1776, and in the Bills of Rights of the various State Constitutions, be followed by government most like or most divergent from that to which the colonists had been earlier accustomed? It was not unnatural for the man of simplest mind, of the least foresight, to declare that what would be in the highest sense satisfactory to the Americans was a government in many essential points quite different from that which they had had hitherto.

There were at least three propositions in respect of the new governments. First, the very conservative view which made itself felt in every part of the country, but which was most influential in the South.[9] This faction would have made the States monarchies or aristocracies, with magistrates serving for life. Second, the moderate republican view of which John Adams was the ablest and most distinguished representative; and third, the ultra-democratic view, which got its chief support from France, and of which Benjamin Franklin was a friend and defender.

Dr. Franklin, who had been in London in the interest of the colonies, met there a young Englishman named Thomas Paine. He was a writer, it was thought, of some ability, and although not professing to be this when he got to America, but instead, one who had just found a voice, as if inspired, in this great contest against British power and aggression now about to ensue, he did not disappoint his patron, Dr. Franklin. "In the course of this winter" (1775-76), John Adams writes in his autobiography,[10] "appeared a phenomenon in Philadelphia, a disastrous meteor, I mean Thomas Paine". He almost immediately published a pamphlet which he called *Common Sense,* and he continued to

[9] Cf. John Adams' *Works,* Vol. IV, p. 201.
[10] *Works,* Vol. II, p. 507.

write under this name throughout the war, being employed for a time by Congress, winning some admirers, but not a few acquaintances, who regarded him with no more respect than did Mr. Adams. He afterwards returned to Europe, offered his services to the French democrats,[11] replied to Burke's aspersions against the French nation in respect of the Revolution in a book that he called the *Rights of Man,* was elected a " citoyen de France ", and was finally chosen to the Convention where he sat among the members who took the nickname of " the Mountain ".[12] He was an international firebrand in very truth, a kind of American Mirabeau without the power of declamation, who, however, wrote English savagely and unscrupulously, and somehow met with many attentive readers. His *Common Sense* passed through several editions, and appearing as it did when the people were undecided whether or not to sever their relations with England, not knowing, if they should do so, what would follow, his pamphlet won a degree of popularity beyond any intrinsic worth, so far as we are able to perceive upon a perusal of it at the present day.

This pamphlet was an appeal " addressed to the inhabitants of America ". The author revealed himself a revolutionist in every part and member. " We have it in our power ", he said, " to begin the world over again. A situation similar to the present hath not happened since the days of Noah until now." [13] He traced the origins of government in a manner clearly pointing to his familiarity with the *Contrat Social,* since Rousseau's happy peasants under the oak were not dif-

[11] Cf. Letter to the authors of the *Republican* which was published by Condorcet, in *Political Writings* of Thomas Paine, Albany, 1794.

[12] Cf. Borgeaud, *op. cit.,* p. 206.

[13] *Political Writings—Common Sense,* p. 58; cf. Burke's words addressed to the revolutionists in France: " You chose to act as if you had never been moulded into civil society, and had everything to begin anew. You began ill because you began by despising everything that belonged to you. You set up your trade without a capital. If the last generations of your country appeared without much lustre in your eyes, you might have passed them by, and derived your claim from a more early race of ancestors. Under a pious predilection for those ancestors,

ferent from those Paine called to mind, when he wrote[14] that when the people of a community were ready for government "some convenient tree will afford them a state house under the branches of which the whole colony may assemble to deliberate on public matters". And he continued: "In this first parliament every man by natural right will have a seat." As the colony increased in size, it would be necessary for them to agree together "to leave the legislative part to be managed by a select number chosen from the whole body, who are supposed to have the same concerns at stake, which those have who appointed them, and who will act in the same manner as the whole body would act were they present".[15] He indicated that frequent elections would be necessary, and that the system of government should be "simple". By this he meant that he should favor an assembly of a single chamber, which he, with his friend Franklin, and the other leaders of the Franco-Pennsylvanian Democracy would soon introduce into the fundamental law of the State of Pennsylvania. He found the weakness of the English Constitution to be its complexity, while Montesquieu and John Adams regarded this thing as the chief source of its strength. The three branches of government, the executive, legislative and judicial, checking each other, in their result he declared to be contradictions, and the whole system of balances considered in the light of his philosophy, was reduced to "a mere absurdity". It is true that Adams himself expresses the opinion that the influence of Paine's pamphlet was not so great as many had considered it;[16] but it was doubtless difficult

your imagination would have realized in them a standard of virtue and wisdom beyond the vulgar practice of the hour's, and you would have risen with the example to whose imitation you aspired. Respecting your forefathers, you would have been taught to respect yourselves. You would not have chosen to consider the French as a people of yesterday, as a nation of low-born servile wretches, until the emancipating year of 1789".—*Works*, London, 1815, Vol. V, pp. 82-83.

[14] *Common Sense*, p. 7; cf. *Plain Truth*, the pamphlet written in reply to *Common Sense*, in defence of the English Constitution with its systems of checks and balances, as expounded by Montesquieu.

[15] *Common Sense*, p. 7. [16] Adams' *Works*, Vol. II, p. 509.

then, as it would be to-day, to determine how great or little may be the effect of such a publication at an opportune moment. Its publication at any rate, alarmed the Massachusetts leader, as he is free to admit in his review of this period of his life.[17] He took immediate steps to counteract the hurtful tendency, as he thought it to be, and we shall now see with what success, and as a result of how much pains and effort.

John Adams while attending the sessions of the Continental Congress, conferred with the members from the other colonies whom he met there regarding the various problems of government which would arise in case of a severance of relations with Great Britain, and he soon came to be regarded as a leader in American constitutional discussion. Richard Henry Lee, a delegate from Virginia, upon whose support in Congress Mr. Adams, as a rule, could certainly rely, was so much impressed by the views of his Massachusetts colleague, that he asked the latter to reduce his plan to writing, which he did in the form of a letter addressed to Mr. Lee from Philadelphia, under date of November 15, 1775.[18] "Taking nature and experience for my guide",[19] he said, "I have made the following sketch"; whereupon he proceeded to state with great lucidity that "a legislative, an executive and a judicial power comprehend the whole of what is meant and understood by government". "It is balancing each of these three powers against the other two," he added, "that the efforts in human nature towards tyranny can alone be

[17] Mr. Adams says that he considered Paine's plan for an assembly of one chamber, "as flowing from simple ignorance and a mere desire to please the Democratic party in Philadelphia, at whose head were Mr. Matlack, Mr. Cannon and Dr. Young. I regretted, however, to see so foolish a plan recommended to the people of the United States, who were waiting only for the countenance of Congress to institute their State governments. I dreaded the effect so popular a pamphlet might have among the people, and determined to do all in my power to counteract the effect of it".—*Works,* Vol. II, pp. 507-8.

[18] *Works,* Vol. IV, pp. 185-187.

[19] Cf. Rousseau's introduction to his *Contrat Social* alluded to in this chapter, *ante,* p. 2.

checked and restrained, and any degree of freedom preserved in the constitution."

The legislature, he said, should consist of a "house of commons", which would represent the people, and a "council" elected by the house, either from its own members or the citizens at large, to consist of twelve, sixteen, twenty-four or twenty-eight persons. Each chamber should have a negative on the bills passed by the other. The executive power should be exercised by a governor chosen annually, triennially or septennially, as might be preferred, by joint ballot of the house of commons and the council. The governor should possess the power of vetoing bills which the legislature had passed. He should appoint civil and military officers, with the advice and consent of the council, and have command of the army. The judicial power was to be exercised by judges appointed by the governor, not elected by the people.

Mr. Adams' plan in the main, was for a government such as has to-day, with slight modification, everywhere come to be the prevailing form in this country. Virginia at that time was perhaps the most important colony among the thirteen, and naturally much concern was felt as to the result of the convention which was soon to meet there to arrange for a transition from a royal, that is the colonial, to an independent republican government. Adams, in response to a request for a fuller statement of his views on this subject, wrote his "Thoughts on Government", also in the form of a letter to a Virginian, which was published early in 1776,[20] and was widely circulated in Virginia, exerting a very considerable influence upon the members of the convention.[21] There was in Virginia among most of the "opulent families" of the

[20] *Works*, Vol. IV, pp. 193 *et seq.*

[21] *Works*, Vol. I, p. 208. See also Letter of Patrick Henry to John Adams, May 20, 1776, *Works*, Vol. IV, p. 201. Adams' pamphlet led to the publication of another by an unknown author, which was entitled "An address to the convention of the colony and ancient Dominion of Virginia on the subject of government in general, and recommending a particular form to their consideration by a native of the colony". This was designed to counteract the popular influence of Adams'

State, "a strong bias to aristocracy".[22] Adams, in the "Thoughts on Government", which he offered to the Virginians, advanced his opinion, against that of the "meteor" Paine, that "the happiness of society is the end of government". Paine, following Rousseau, had said that "government even in its best state is a necessary evil".[23] "There is no good government", Mr. Adams continued, "but what is republican", and he pointed to the writings of Sidney, Harrington, Locke, Nedham, Neville, Burnet and Hoadly, thus indicating the breadth of his reading upon political subjects. The "only valuable part of the British Constitution" at the time he wrote was, he declared, republican. "In a large society inhabiting an extensive country, it is impossible that the whole should assemble to make laws. The first necessary step then, is to depute power from the many to a few of the most wise and good", and here we have a well-summarized statement of the representative principle, which he desired should not be departed from.

He continued his inquiry regarding the proper means of choosing these representatives, declaring himself specifically opposed to Paine's legislative assembly of a single chamber[24] to which he stated his objections under six heads, among these being the following,—that such a body was liable to all the "vices, follies and frailties of an individual", being hasty, passionate, enthusiastic, prejudiced as the whim might seize it; that it was apt to be avaricious, exempting itself from burdens, and putting them on others; and that it was ambitious, and would vote to make itself perpetual. He again aimed to impress it upon his readers, how essential it was to keep the

writing. For this document see Force's Archives, Fourth Series, Vol. VI, cc. 748-754.

[22] Patrick Henry's letter to John Adams, Adams' *Works*, Vol. IV, p. 201.

[23] *Polit. Writings* of T. Paine, in pamphlet *Common Sense*, p. 1.

[24] *Works*, Vol. III, p. 22. Adams writes in his Autobiography about this time: "I knew that every one of my friends and all those who were most zealous for assuming governments, had, at that time, no idea of any other government but a contemptible legislature in one assembly, with committees for executive, magistrates and judges."

legislative, executive and judicial departments of the government properly separated, and repeated his suggestions respecting the constitution of these various departments, contained in his letter of a few months before to Mr. Lee. He expressed his dissent, too, from the proposition for a frequent rotation of officers which is an error that was soon committed by the Philadelphia democrats in the framing of the first Constitution of Pennsylvania and which later became one of the subjects of strife in the bitter contest that ensued between the Constitutionalists and Anti-Constitutionalists in that State.

But Adams, too, was quite as alert to check the royalists and aristocrats, as the single-chamber democrats. On March 23, 1776, he wrote a letter to General Gates[25] in which he alluded to the problem confronting the Americans in a more general way. "The difficulty", he says in this communication, "lies in forming particular constitutions for particular colonies, and a continental constitution for the whole. Each colony should establish its own government, and then a league should be formed between them all.[26] This can be done only on popular principles and axioms, which are so abhorrent to the inclinations of the barons of the South, and the proprietary interests in the Middle States, as well as to that avarice of land, which has made on this continent so many votaries to Mammon, that I sometimes dread the consequences." The influence of Adams and his friends against the "barons of the South" in so far as Virginia, the largest of the southern colonies, was concerned, was effectively impressed upon the convention which framed the first Constitution of that State, and in Pennsylvania, a "Middle State" in which the proprietary interests were so strong, they were not these interests which Adams was to combat in the constitutional discussions of the next few years. He was to be con-

[25] *Works*, Vol. I, pp. 207-8.

[26] This was done, the league being organized under the Articles of Confederation, of 1777, and although this was in accordance with Adams' advice at this time, he later was among the first to perceive the need of a stronger central government; cf. *Thoughts on Govt.*, Vol. IV, p. 200.

fronted by the party which was too democratic, rather than too aristocratic. The way was being prepared at Philadelphia for a constitution, which was the most extraordinary ever adopted in America, and one of the most impractical which men have ever been invited to live under in any part of the world.

A little later, Mr. Adams embodied his views in respect of a suitable government for the Americans, in a letter to John Penn, with the hope,—and it was not a vain one,—of exerting an influence in favor of the English form of government in North Carolina, where, as in Virginia, a convention was about to meet for the purpose of adopting a State Constitution.[27] His efforts in the same direction were also extended into other colonies, with no doubtful result.[28]

Concerning Mr. Adams' system of government for the new American States, his grandson, Charles Francis Adams, pays a just tribute to the man, when he writes: "It is very true that the outline of the system thus recommended contains the same features in the main, which are found in the colonial charters of New England, and are in them, taken from the constitutional forms of the mother country. Mr. Adams had made them the study of his life, and fully believed that they rested upon general principles of the highest possible value. He had little of the purely scheming temper that has led some of the noblest minds of the world to devise systems of their own, ingenious, and sometimes imposing, but utterly wanting in practical adaptation to the feelings and habits of those for whose use they were intended. He had studied Plato, and Montesquieu, Milton, Locke and Harrington quite as

[27] *Works*, Vol. IV, p. 203.

[28] *Works*, Vol. I, p. 209. Chas. Francis Adams, in his "Life of John Adams", says: "His sentiments were so extensively diffused as materially to guide the public mind in the construction of many of the State Constitutions. The immediate effect was particularly visible in those adopted by New York and North Carolina, the last of which remained unchanged for sixty years, and at the time of its amendment, in 1836, was the only one left of the Constitutions adopted at the Revolution."

profitably to avoid their errors as to heed their counsels. * * * The people though attached by habit to the old forms were very open to receive new impressions. Their ideas upon government in general were not a little crude. Mr. Adams did not permit himself to be led astray by any of these temptations. Conservative by temperament and education, he applied his mind to the task of saving whatever experience had proved to be valuable in the British constitutional forms. * * * The skill with which this was done may be best understood from the result, for it is undeniable that the success of the constitutions adopted in the respective States has proved proportionate to the degree of their approximation to the general features of his plan." [29]

In the meantime, Paine and those who entertained his opinion that British models should be wholly departed from, who were ready "to begin the world over again," and to build it anew on other foundations, were actively making their propaganda against Mr. Adams, and were achieving a degree of success quite out of proportion to their due. This was particularly true in Pennsylvania, which from now on, throughout the Revolution, and until the State constitutional convention met in 1790 and definitely made an end to all these singular notions, was the stronghold of the French party on this continent.

Upon the 10th day of May, 1776, a resolution was passed by the Congress, authorizing the various colonies to institute at their option, new governments. The resolution, to which Mr. Adams, by appointment of the Congress, drafted a fitting preamble, was as follows: "That it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."

Already the Virginia Convention had met at Williams-

[29] *Works*, Vol. I, p. 209.

burgh, and in Pennsylvania where the differences between the proprietary interests and the more popular interests had been prolonged, and where the dissatisfaction of large sections of the people was so great, and the distrust for the aristocratic colonial assembly so deeply rooted, steps were immediately taken to establish a new government, as the Congress had advised. There were at this time in the colony, two bodies almost parallel in authority;—the Assembly and the "County Committees", organized by the citizens in 1774, to arrange for appointing delegates to Congress, and to confer with the Assembly rather gratuitously in respect of questions of common gravity, so many of which were arising constantly, by reason of England's attempts to coerce the Americans. These committees, called at first "Committees of Correspondence", came later to be known as "Committees of Inspection and Observation", a name more narrowly descriptive of their specific duties and functions. The members were elected by the people as were the members of the Assembly, though the bodies were extra-constitutional in every sense, and without authority except in so far as this was derived from legislation of the Continental Congress.

There was in the colony, so soon as the resolution of May 15, 1776 had been passed, a dread lest the Assembly should undertake to institute a government on its own account, although the members of the proprietary party declared that the present government was itself "sufficient to the exigencies of their affairs" and that any new government, therefore, would be superfluous. To avert such a *coup*, the Philadelphia City Committee issued a call for a public meeting, to be held in the "State House Yard", on May 20, 1776, which, according to the newspapers of the time, was attended by several thousand persons. It was agreed on this occasion that, the Assembly being incompetent for the task of instituting a new government, a "provincial Convention" should be chosen by the people. In order to determine upon the methods to be adopted in selecting the members of this Convention, a general conference was called to meet in Philadelphia

on June 18. The Philadelphia City Committee, taking the initiative in this matter, at once sent out letters which were delivered in many cases by its own members, or other deputed representatives to the Committees in the various counties. At this conference there were 108 duly accredited deputies from the different Committees. The body proceeded at once to perfect the arrangements for the provincial Convention, which was to meet "for the express purpose of forming a new government * * * on the authority of the people only".

The "associators", or the militiamen, who, in many cases, had been denied the suffrage heretofore, greatly to their dissatisfaction, were now all enfranchised *ipso facto* by reason of their connection with the army, and all other persons who should present their votes for members of the Convention, were required to take an oath of fealty to America, as against Great Britain. The number of members of the Convention was fixed at ninety-six, or eight for the city and each county, irrespective of differences in population or wealth. The elections were appointed for July 8, the entire movement being hurried forward so precipitately as to prevent adequate discussion of the project, and the people at a distance from the city were not even allowed an opportunity to express their opinions in numbers at the polls. One week after the elections or on July 15, the Convention met at the State House in Philadelphia, continuing in session by adjournments, till the 28th day of the ensuing September. The *personnel* of this body is a matter of some interest, in view of what it proceeded to do so soon as it had met. It was composed, of course, of the committeemen or those in whom the latter had full confidence, being an assembly, radical, perhaps, beyond any which had gathered together before in the colonies. The elections had been completely in the hands of the county committees, and they had passed off without much excitement or contest. The main test in the case of candidates at this time was their loyalty to the cause of independence. Of the ninety-six delegates, thirty-one had been members

of the conference, which had met on June 18. Ten had been members of the Convention of January, 1775, and eight had sat in the Convention of July 15, 1774. There were few who had been members of the old proprietary Assembly.[30] Nearly all were frontiersmen, since the Western counties which were being rapidly populated, each had a representation in the Convention equal to Philadelphia city. These delegates were for the most part farmers; some of them millers, that is, proprietors of small grist mills, which crushed and ground grain by water-power. The pioneer farming class, imbued with ideas of a singularly democratic kind, predominated in the councils of the Convention. Philadelphia was naturally the center for such scholarship as existed at that day in the colony, and it was then the leading American city, being the assembling place of the delegates from the different colonies, which soon came to be States, the first capital of the Republic. The city's advantage in this respect was evidenced by the presence in the Convention, in the Philadelphia delegation, of Benjamin Franklin, who was at once chosen to be the President of the Convention; David Rittenhouse, James Cannon, a graduate of the University of Edinburgh, and a tutor in the Academy of Philadelphia; Owen Biddle, a member of the Philosophical Society and an astronomer, and George Clymer.

If our records are trustworthy, there were only four lawyers in the Convention,—George Ross, of Lancaster, who was elected Vice-President of the Convention, and occupied the

[30] These facts regarding the membership of the convention are gleaned from Dr. W. H. Egle's Biographical Sketches in *Pennsylvania Magazine*, Vol. III, pp. 46 *et seq.* John Jacobs of Chester County had sat in the Assembly continuously since 1762, and Benjamin Franklin had of course been a burgess from the city for many years. Benjamin Bartholomew had represented Chester County in the Assembly since 1772. George Ross had held a seat from Lancaster County since 1768. John Wilkinson, of Bucks County, had been in the Assembly but only for one year, in 1762-3. David Rittenhouse had been elected in 1776. George Clymer and eight others who were members of the Convention, had been elected to the Assembly just a few weeks before, when the functions of that body were about to terminate.

chair in Franklin's absence, being the most eminent in the little group. There was scarcely any one who could be looked to to lead the deputies aright, and to act as a balance against the rash, the enthusiastic and the ignorant among the members, for most of those who had knowledge of constitutional questions and of statecraft had been left at home, as suspected Tories, or for other reasons were not, unfortunately for the early history of the State, called to the task of preparing for it a frame of government.

This Convention, gathered together in haste and panic, only a fortnight after it had met, on August 2,[31] determined by vote in committee of the whole, that the new government should be centered in a legislature of but a single chamber.[32] The warnings which John Adams had uttered with so much courage and earnest conviction, and which had had their effect in Virginia, and were being heeded in other of the new commonwealths, fell upon deaf ears in the capital city of the United Colonies, the city of Franklin, and of Thomas Paine. The debates upon the "Frame," or that part of the Constitution following the Bill of Rights which was adopted on August 16, began on August 21, and continued until September 5. The "Frame" was published in pamphlet form on September 10, though it was not printed in the newspapers until a few days later. It was desired that it should be circulated among the people for their consideration, it was said, and yet on September 16, the Convention resumed its sessions and hastened to adopt the draft, which it did on September 28, promulgating it at once as the Constitution of the State. It was said with great truth afterward, when it was alleged that the people had not had a hand in determining whether they desired to live under such a form of government, that the pamphlets had scarcely got outside the city

[31] Minutes of the Convention, Philadelphia, 1776, p. 18.

[32] It is noteworthy that in the national government, in so far as there was yet one at hand, no division of powers existed. "All the powers of government,—legislative, executive and judiciary,—were at that time (1776) collected in one centre, and that centre was Congress." Adams' Autobiography, *Works*, Vol. III, p. 87.

before the Convention met again, and proceeded to ratify its earlier work.[33] This was not a consultation with the people, a reference to them of the important question of whether or not they should have one constitution or another—a question which, in Massachusetts and New Hampshire, and elsewhere in America, was coming now to be regarded as one that the electors should determine in their town meetings, and at the local polling places.

Very few changes were made in the original frame in those days from September 16, when the Convention resumed its debates, to September 28, when Benjamin Franklin and the other members, except those who were so much dissatisfied with the work as to refuse thus to endorse it, placed their signatures upon the document, indicating that it was the supreme law of the new State. The most peculiar feature of the new government, though it embraced other odd schemes which will be spoken of later on in this description of a strange phase of democracy in America, was the unicameral legislature of which we have never since had an example in the American States, and which is a prevailing part of the scheme of government in no important community to-day, though the world has been recently reminded of the possibility of a return to greater simplicity in this respect in England, where the Radicals have, with more or less seriousness, proposed the abolishment of the House of Lords.[34] Although this subject had earlier been discussed in the Convention without convincing the majority party of the error of their general course, a final effort in behalf of a bicameral legislature had

[33] Under these conditions, a writer in the *Pennsylvania Packet*, February 13, 1779, said, that "only a few people of Philadelphia and its neighborhood could have the least opportunity of examining it or offering their remarks, which were little regarded, and the Constitution after circulating a few days, in print, about the streets of Philadelphia, was finally adopted with scarce any material amendments". See also Resolutions of Town Meeting to protest against the Constitution, Phila., Oct. 21, 22, 1776.

[34] Lecky, *Democracy and Liberty*, Vol. I, pp. 361 *et seq.* Cf. Articles in London *Times* on "Leeds and the Lords", Sept. 13 and 14, 1894, and "The Reform of the House of Lords", Nov. 28, 29, 30, 1894.

been made by the friends of the English system of checks and balances only a few days before the adjournment of the body. The motion to amend the frame in this respect, and to establish two houses instead of one, was offered by Mr. Ross, the Vice-President of the Convention, on September 16, and it was seconded by Mr. Clymer of Philadelphia, two of the leading minds in the Convention.[35] It was decided, though the Minutes are silent as to the vote on this subject, that further debate upon this point should be precluded, since it had been fully discussed before. There was to be but a single house; conviction seemed to prevail among the members in respect of this feature of the government. The "supreme legislative power", as the Constitution describes it, was to repose in a "house of representatives of the freemen of the Commonwealth or State of Pennsylvania",[36] whose members were to be chosen annually in the counties, each county at first returning an equal number, though the basis of representation was soon to be changed to the more equitable one of taxable inhabitants.

Upon this single assembly was conferred almost absolute power. As every suggestion regarding a Senate, appeared in the eyes of the Pennsylvania democrats to be a movement to establish an odious House of Lords, an "upper" house, whose very name was inconsistent with the principles of equality, so the term Governor smacked too, of royalty, the royal and proprietary colonies in America all having had Governors. They would therefore have no officer known by this name, and none, indeed, of any kind who should stand as an obstacle between the people and the State. For the people were the State, and the State was the people. Like Paine, who said in his *Common Sense,* that he took his rule from a "principle in nature which no art can overturn, viz: that the more simple a thing is, the less liable it is to be disordered, and the easier repaired when disordered",[37] the framers of the Constitution of Pennsylvania would put no

[35] Cf. Minutes of the Convention, p. 51.
[36] Constitution, sec. 2. [37] *Common Sense,* p. 8.

clog upon the wheels of government. Therefore there should be no Governor, and no one exercising the powers of a Governor. There should be a plural executive, to be called the Supreme Executive Council, in which was vested the "supreme executive power",[38] and this body was to have a President, who was to be called the President of the State of Pennsylvania, in true republican form. The councilors were to exert no legislative power whatsoever and they did not constitute a second house. They, with their President, had no negative upon the legislature, and were not even authorized to offer their advice concerning the passage of any law, except in so far as this may have been contemplated when it was provided that the Council should prepare business to be laid before the Assembly.[39] Each county was to elect one councilor to serve for a term of three years. As there were then twelve counties, it was at first a body therefore of twelve members. One third of the Council was renewed annually, four seats being vacated each year. In the Constitution of our very squeamish democrats, as if an apology were needed, the following explanation of this system is found: "By this mode of election and continual rotation, more men will be trained to public business, there will in every subsequent year be found in the Council a number of persons acquainted with the proceedings of the foregoing years, whereby the business will be more consistently conducted, and moreover, the danger of establishing an inconvenient aristocracy will be effectually prevented."[40]

By the original draft of the Constitution, which was printed in Philadelphia in September, the Assembly in addition to its other extensive powers, was to elect nine men from outside its own membership to compose the Council.[41] By this deviation from the original plan, which resulted in the Council being made elective by the people, the Assembly was

[38] Constitution, sec. 3. [39] Sec. 20. [40] Sec. 19.

[41] *Pennsylvania Gazette*, Sept. 18, 1776.—"The proposed plan or frame of government for the Commonwealth or State of Pennsylvania", sec. 18.

deprived of a very considerable part of its authority over the executive department of the government, though it was still charged with the task of meeting annually with the members of the Council, and of electing by joint ballot from the latter body, the presiding executive officers of the State, a President and a Vice-President.[42] The State treasurer was to be appointed by the Assembly, and the delegates to the general American Congress were similarly chosen, which was the prevailing method in other States at that time. It could elect, removable at its own pleasure, a register of wills and recorder of deeds, in the city, and in each county, [43] and impeach " every officer of state, whether judicial or executive ", the proceedings to be heard before the President and Vice-President, and a quorum of the Council.[44] The judges of the supreme court who were to be appointed by the Council, could be removed at any time by the Assembly for " misbehavior ".[45] Justices of the peace who were elected by the people in the city and counties, could in the same way be displaced by the Assembly for " misconduct ".[46]

Here, in respect of the judiciary the principle of the separation of powers, which Mr. Adams contended for was grossly violated. That the judges should be removable by the legislature for " misbehavior " was a rule calculated to bring about a subserviency in the courts which was gravely contemplated by conservative men. That the Assembly should be unchecked by a second house, a governor or any authority equal in power and dignity in the legislative department of the government, was occasion for real alarm, but that the courts of justice, too, were to be subordinate to this supreme single chamber, was a remarkable circumstance.

It is true, there was a fanciful plan by which the work of the Assembly could be reviewed at periods of seven years. Then the people of each county and the city were to elect a body to be called a Council of Censors.[47] This Council was to

[42] Sec. 19. [43] Sec. 34. [44] Sec. 22. [45] Sec. 23.
[46] Sec. 30.
[47] Cf. Rousseau, *Contrat Social*. Rousseau's chapter on Censors must

meet and discuss the question whether during the septennial period which had just been passed through, the Constitution had been "preserved inviolate in every part, and whether the legislative and executive branches of the government have performed their duty as guardians of the people, or assumed to themselves or exercised other or greater powers than they are entitled to by the Constitution".[48] They were to examine into the collection and expenditure accounts of the government, to call for papers and records, pass "public censures", order impeachments and "recommend" the Assembly to repeal such laws "as appear to them to have been enacted contrary to the principles of the Constitution".

The Assembly was, indeed, restricted in one important respect. It was specifically denied the power "to add to, alter, abolish or infringe any part of this Constitution",[49] although the tendency in the United States in a few years, was to set in strongly in the direction of giving the State legislatures this right, usually, it is true, only after the assent of the people has been expressed in a plebiscite, yet solely upon the initiation of the legislature. In Pennsylvania, the Council of Censors was the only body which could start the machinery for a change in the Constitution, be it ever so small. By a two-thirds vote the censors could summon a convention, and this body might then amend the fundamental law of the State, in the same manner in which it had been originally established.

In order that there might be no suspicion of an hereditary system in office-holding, there was to be frequent rotation in the civil service. Thus any person who had served as a councilor for three successive years, that is for one term, was not to be capable of holding this office again for four years afterwards.[50] Representatives in the Assembly were not to continue in their offices more than four years in any

have suggested this very odd device to the Pennsylvanians when they were seeking for a government which would make them wholly free of English constitutional usage.

[48] Sec. 47. [49] Sec. 9. [50] Sec. 19.

seven,[51] and the terms of certain other officers were also limited by the Constitution.[52]

It has always been a matter of interest among those who have written of the early political history of Pennsylvania—few, unfortunately, in number—to inquire what precisely were the influences which led the Convention to adopt such a system of government, when none of the other colonies turned away so lightly from custom, tradition and the advice of good authorities on constitutional subjects. It is true that Georgia and Vermont in the next year, 1777, adopted constitutions which in respect of the single house of legislature, at least, followed the Pennsylvania plan.[53] But an examination of these instruments will show that they differ in some rather important respects from the first Constitution of Pennsylvania. Vermont, on account of a territorial question, was not one of the original States, being admitted to the Union only in 1791, after the adoption of the Federal Constitution, when the confederation had made way for the federation, the *Staatenbund* for the *Bundesstaat*. Vermont had its Governor and Lieutenant-Governor, instead of a President and Vice-President. There was a Council in lieu of a second house, which was without the power of vetoing legislation, however, quite as in Pennsylvania. Nevertheless, it was provided in Vermont, and this was a difference of some importance, that "to the end that laws before they are enacted may be more maturely considered, and the inconveniency of hasty determination as much as possible prevented, all bills of public nature shall be first laid before the Governor or Council, for their perusal and proposals of amendment".[54] In Pennsylvania, the only suggestion that delay might be expedient, was contained in a provision which placed the responsibility with the people, rather than with the councilors.

[51] Sec. 8.

[52] For instance, sheriffs and coroners in counties, sec. 31.

[53] Cf. Adams' *Works*, Vol. II, p. 508. "Matlack, Cannon, Young and Paine had influence enough to get their plan adopted in Georgia and Vermont, as well as Pennsylvania".

[54] Con. of Vermont, 1777, sec. xiv.

This clause was as follows: "All bills of public nature shall be printed for the consideration of the people before they are read in General Assembly the last time for debate and amendment, and except on occasions of public necessity, shall not be passed into laws until the next session of Assembly".[55] The Governor, Lieutenant-Governor and Treasurer in Vermont, were to be elected by the people annually, instead of by the Assembly as in Pennsylvania.[56] The councilors in Vermont were elected by *scrutin de liste,* that is, on a general ticket,[57] while in Pennsylvania each county returned one member. The unusual feature in the Pennsylvania Constitution regarding a Council of Censors was carried over into the Constitution of Vermont.[58] As in Pennsylvania, the censors were to meet every seven years, and for the same purpose,—to ascertain whether the Constitution had been "preserved inviolate in every part", etc. The members of the body, however, were again to be elected on a general state ticket, instead of by counties as in Pennsylvania. This peculiar institution was continued in the later Constitutions of Vermont, and it survived, indeed, until 1870, when the section was finally abrogated.[59] By this method many conventions were assembled, and a number of amendments made in the fundamental law of the State.

So early as in 1786, the Constitution of Vermont of 1777 was modified in an important way, and it was declared specifically in that year that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other".[60] A Senate in name and in fact, was, however, not

[55] Sec. 15, Pennsylvania Constitution.

[56] It is true that the councilors sat and voted with the Assembly in the election of a President and Vice-President in Pennsylvania, but as there were seventy-two assemblymen, and only twelve councilors, the council was not a very great force. The Assembly, however, was restricted in its choice to two of the twelve members of the Council. The Constitution forbade their going outside that body for candidates.

[57] Con. of Vermont, sec. xvii. [58] *Ibid.,* sec. xliv.

[59] Amendments to the Constitution of Vermont, art. xxv, sec. iv.

[60] Constitution of 1786, chap. II, sec. 6.

introduced into the legislative system of the State, until 1836.[61]

Looking briefly at the Constitution adopted in Georgia in 1777, which lasted until 1789, we find that it too deviated from the Pennsylvania example. It was a carelessly framed document. Though this was not true in any sense, it was stated in plain language that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other".[62] The Council was elected by the Assembly from its own body, being virtually therefore a committee of the house.[63] The Governor, bravely called by this name, was also an assemblyman, annually elected to the high post by his colleagues.[64] The Council was not without legislative power, though this was only advisory. It was provided in the Constitution that "all laws and ordinances shall be sent to the executive council after the second reading, for their perusal and advice".[65] The bills submitted to it were to be returned to the Assembly by the councilors, with the latter's remarks thereon, within five days,[66] and then came a ceremony, which to the disciples of liberty and equality in Pennsylvania would have been distasteful to the last degree: "A committee from the Council sent with any proposed amendments to any law or ordinance, shall deliver their reasons for such proposed amendments, sitting and covered; the whole house at that time except the speaker uncovered". It is sufficiently plain in face of the provision establishing this undemocratic rite, that the Georgian democrats were not firmly grounded in the new principles of government, as they had lately been expounded in Philadelphia. But the single house in Georgia was to be abolished in 1789, and another Constitution was adopted, in which it was declared explicitly at the very beginning of the instrument that "the legislative power shall be vested in two separate and distinct branches; to wit, a

[61] Amendments, art. iii. [62] Art. i.
[63] Art. ii. [64] Art. xxiii.
[65] Art. viii. [66] Art. xxvii.

Senate and House of Representatives, to be styled the General Assembly ".[67]

How, now, was it that this peculiar system was instituted in Pennsylvania, and who was responsible for its origin? In general, as has been noted already, there are two facts to be considered in explaining the existence of this radically democratic feeling in Pennsylvania, and it was not confined to this State alone. Even in Massachusetts, where John Adams' influence was greatest, and the Constitution which he framed has survived to this day, with some relatively slight amendments, there was a considerable body of sentiment favorable to a single house. These two facts were,— first, the presence in the conventions of large numbers of the frontiersmen, who had had contests in colonial days with the wealthier property-owning classes, living in or near the cities. Thus in Pennsylvania, there had been a hostile feeling for many years between these elements, owing to the belief generally entertained, that those who could were not paying a due proportion of the public charges, in order to defend and advance the interests of all the people, especially those residing in the Western counties, who came frequently in contact with the Indians. Secondly, there was a conviction, that when the colonies were freeing themselves from England, they should discard English government *in toto*, and this feeling was intensified by the presence in every community of bodies of men called Tories, who still continued friendly to the motherland, and at once came to be regarded with distrust, when they were not indeed the subjects of great popular odium.[68] Their influence, in so far as they were able to exert any, was, of course, against new constitutions of every kind in the first instance, and then against those which were most democratic. It is thus that it was possible for the

[67] Art. i, sec. 1.

[68] James Madison in *The Federalist*, no. xlix, says that the early constitutions of the American States were formed " in the midst * * of a universal ardor for new and opposite forms, produced by the universal resentment and indignation against the ancient government ".

enthusiasts in Pennsylvania to do what they had done in the Convention, and now to wage their remarkable campaign in its defence which continued throughout the war, and up to the years 1789 and 1790, when the Constitution, thoroughly discredited, was superseded by another of the general American type.

As for the scholastic and academic side of the movement, which gave Pennsylvania this Constitution, it has always been the custom, and very rightfully indeed, to associate Benjamin Franklin's name with the single-chamber legislative system. There, however, has been a certain element of doubt respecting the actual part which Dr. Franklin took, in inflicting upon the State this novel and highly original scheme of government. There is no room for question, that his leanings were wholly in the direction of a single house, though in the real work of framing the Constitution, he seems not to have had more than an advisory part. He was the President of the Convention, but he was not regularly in attendance at the sessions. He appended his signature to the instrument, and before the Convention adjourned, a resolution was passed by the body, thanking him for the honor he had conferred upon it "by filling the chair during the debates on the most important parts of the Bill of Rights and Frame of Government, and for his able and disinterested advice thereon".[69] There were others, however, who were concerned in the actual draft and these in so far as they have been named were Timothy Matlack,[70] James Cannon, Dr. Thomas Young, Thomas Paine and George Bryan, the last three not having been members of the Convention at all, but the leading spirits in a small junta, which first by the name of the Whig Society, and later the Constitutional Society, battled for their

[69] Minutes of the Convention, p. 67.

[70] Timothy Matlack was originally a member of the Society of Friends, but in the Revolution left the sect and became a "Free Quaker" or "Fighting Quaker". It is said that he wore his sword in the streets of Philadelphia. When asked what its use was, he replied, "It is to defend my property and my liberty".

beloved principles as valiantly as did La Rochefoucauld, Condorcet, Mirabeau and the other friends of a single legislative assembly and unrestricted popular government throughout a contemporary period in France.[71]

What Franklin's part in the work really was, those who lived at the time have not been very willing to state, though evidence has later been adduced in sufficient quantity to implicate him seriously in the framing of the peculiar instrument. Dr. Franklin's position, not only in America, but in the world at large, was somewhat unusual. He had been in France on at least two occasions prior to his long residence there of some nine years, while the Revolution was in progress in America, when he represented the new States, an important mission upon which he embarked shortly after the Pennsylvania Convention had adjourned. The first two visits were made in 1767 and 1769, while he was abroad in the colonial behalf, defending the American cause at London.[72] He seems to have developed a sincere interest while

[71] In speaking of Paine's *Common Sense*, Mr. Adams says that parts of the latter were merely meant to please the Democratic party in Philadelphia, at whose head were Mr. Matlack, Mr. Cannon and Dr. Young. * * * Matlack, Cannon, Young and Paine had influence enough, however, to get their plan adopted in substance in Georgia and Vermont, as well as Pennsylvania".—*Works* of Jno. Adams, Vol. II, pp. 507-8. "The bill of rights is taken almost verbatim from that of Virginia, which was made and published two or three months before that of Philadelphia was begun; it was made by Mr. Mason, as that of Pennsylvania was by Timothy Matlack, James Cannon and Thomas Young and Thomas Paine."—*Ibid.* Vol. III, p. 220. Cf. *Ibid.* Vol. IX, pp. 617-623. Alexander Graydon in the *Memoirs of His Own Time*, Philadelphia, 1846, p. 285, says that the Constitution of Pennsylvania "was understood to have been principally the work of Mr. George Bryan, in conjunction with a Mr. Cannon, a schoolmaster; and it was severely reprobated by those who thought checks and balances necessary to the legitimate distribution of the powers of government. Doctor Franklin was also implicated in the production". Mr. Bryan, Graydon explains, was a native Irishman, and it is suggested that on this account he was opposed to the English system of government. He was later a Vice-President and then President of the State, holding other offices under the Constitution, in the defence of which he was always very loyal. Cf. article in *Pennsylvania Gazette*, Oct. 30, 1776.

[72] Hale, *Franklin in France*, Boston, 1887, Vol. I, pp. 6 *et seq.*

in Paris in the "Physiocratie", and made the acquaintance of old Dr. Quesnay,[73] the elder Mirabeau, Turgot, Dupont de Nemours, with whom his friendship was of long duration, Dubourg, who translated Franklin's works into French, and others of the "Economistes", members of that singular sect, who met together and constructed imaginary wealth out of imaginary land, and carried politics and social economy into one of the strangest phases upon which it has ever entered. They declared that the peasant, the tiller of the soil, was the only producer in society, and Franklin's mind seems to have been in so receptive a condition in respect to political subjects, that he embraced the cult, or at any rate in a characteristic manner led his French friends to think that he was one of their number. Little doubt can remain on this point, when we consider his letter to Dupont of July 28, 1768, in which he acknowledges the receipt of the latter's book on the "Physiocratie"; for here he says that on reading the work he received "a great deal of instruction" from it, that he is "perfectly charmed" with the principles of the "new philosophy", which he declares he "sincerely wishes" to "grow and increase till it becomes the governing philosophy of the human species as it must be that of superior beings in better worlds".[74]

His interest in the various eccentric movements in the French intellectual life of the time, seems to have been deep, and they awakened in him no sentiments of mental revolt such as other men would have felt, as, for instance, Mr. Adams, whose political principles were founded on historical knowledge, and were well and strongly defined. It was thus in respect of a single house, and his other visionary and very democratic views on the subject of government, for which he cannot escape responsibility in the case of the first Constitution of Pennsylvania. There is enough historical testimony to-day to link his name closely to the names of the other

[73] He was ordained a "knight of the order" by the laying on of hands by Dr. Quesnay. Adams' *Works*, Vol. I, p. 661.

[74] Hale, *op. cit.* Vol. I, pp. 13, 14.

men who took a more direct part in the work of writing and adopting the Constitution, and this testimony we may proceed briefly to present.

We are told that Franklin's "participation in it or approbation of it [the work of the Pennsylvania Convention] was roundly asserted by its fautors".[75] Mr. Matlack, who was in a position to know a great deal concerning the early history of the Constitution, wrote in the year 1779, in a political controversy with Richard Bache, that it was largely the work of Mr. Bache's "venerable father-in-law," Franklin.[76] He adds, and Mr. Matlack was present on that occasion: "When the debate was nearly closed, Dr. Franklin was requested by the Convention to give his opinion on the point, and he declared it to be clearly and fully in favor of a legislature to consist of a single branch as being much the safest and best."

There was a little anecdote generally related at the time, which we will repeat, as Mr. Adams gives it in one of his useful and interesting political studies. The President of the Convention having been requested for his opinion upon the subject of the number of houses of which a legislature should consist, rose and said that "two assemblies appeared to him like a practice he had somewhere seen, of certain wagoners who, when about to descend a steep hill with a heavy load, if they had four cattle, took off one pair from before, and, chaining them to the hinder part of the wagon, drove them up hill, while the pair before, and the weight of the load overbalancing the strength of those behind, drew them slowly and moderately down the hill".[77]

[75] Graydon's *Memoirs*, p. 285.

[76] Timothy Matlack in an open letter to Mr. Bache in *Pennsylvania Packet*, March 30, 1779.

[77] *Defence of the Constitutions of the United States of America*, Adams' *Works*, Vol. IV, p. 390. This anecdote is related too by Graydon, *Memoirs*, p. 285: "The Doctor, perhaps a sceptic in relation to forms of government, and ever cautious of committing himself, had thrown out an equivoque about a wagon with horses drawing in opposite directions; as upon the adoption of the Federal Constitution,

What moral Franklin meant to point by his story it would be difficult to say with definiteness, and so inconclusive is this piece of evidence, that perhaps it might well be disregarded altogether. So carefully had Franklin concealed his views from one who should have had unusual means of knowing them, that in 1787, John Adams, in ascribing to Franklin a sentiment favorable to a single house, spoke of it as the latter's "reputed opinion". "I say reputed", Mr. Adams explains, "because I am not able to affirm that it is really his. It is, however, so generally understood and reported, both in Europe and America, that his judgment was in opposition to two assemblies, and favorable to a single one, that in a disquisition like this it ought not to be omitted." [78]

Franklin's arrival in France late in the year 1776, whither he went as one of the officially deputized agents of the American Congress, to secure the sympathy, and if possible the active aid of that nation for the colonies in their struggle against the English crown, was the occasion of many flattering marks of attention. The friends whom he had made on his earlier visits, had not forgotten him. His writings had been widely circulated in Europe, and there were few who did not know his name, and were not prepared cordially to welcome him as the representative of the people who had so lately declared themselves an independent nation. He was honored by the Academy of Sciences in Paris. D'Alembert, the mathematician and philosopher, Condorcet, the philosopher and encyclopaedist, Turgot, the man of letters, public finance and statecraft, the Duke de La Rochefoucauld,[79] and

he told a pleasant story of a self-complacent French lady who had always found herself in the right. But whether he meant by his rustic allusion to show his approbation to checks or otherwise, is an enigma that has never been solved." The anecdote is repeated also by Jared Sparks, in his *Life of Franklin, Works,* Vol. I, 1840, p. 409. Also by Laboulaye, *Histoire Politique des Etats Unis,* Paris, 1855, Tome I, p. 367.

[78] *Defence,* Vol. IV, p. 389.

[79] Louis-Alexandre, Duc de La Roche-Guyon et de La Rochefoucauld d'Anville was born in 1743. He was the son of the great-granddaughter of the Duke de La Rochefoucauld, who was the author of the *Maximes.*

many other leaders of that elegant and visionary school in literature and science, of which Rousseau, Diderot and Voltaire were still more distinguished representatives, received "le grand Franklin" as the living precursor of the new social order, of which they had written and said so much. He was looked to as one of the chiefs of the new democracy, the leading tenet of whose creed was human equality, and universal brotherhood, a great idealist movement, world encompassing, comparable in some degree to the socialist cosmopolitanism that we are confronted with to-day. He attired himself in what was believed to be true democratic simplicity. With his fur-hat and other odd articles of raiment, the enthusiastic disciples of J. J. Rousseau saw in him a living image of the old heroes and philosophers of Greece and Rome.[80] The American Constitutions, and especially that of Pennsylvania, were translated into French. One collection was published in Switzerland so early as in 1778,[81] and another in 1783 at Franklin's own suggestion, and under his personal direction, by the Duke de La Rochefoucauld.[82] Franklin having been the President of the Pennsylvania Convention, the Constitution of that State was looked upon as the embodiment of his own views. Whether it was the truth or not there is nowhere a record that would tend to show that he tried to disabuse the minds of his admirers in France of this idea. Europe was allowed to draw the inference that the Constitution was his own work, and as Adams has somewhere said, it was by remaining passive, and by permitting others by indirection, to arrive at their conclusions without his saying yes or no, that

She made her home the assembling place for philosophers and economists of the eighteenth century and like her son numbered among her friends many notable personages.

[80] Cf. Lecky, *History of England in the 18th Century*, New York, 1882, Vol. IV, p. 52; *Benjamin Franklin, Chef de la Democratie Americaine* par M. Belot, Lyons, 1886, p. 5.

[81] Jellinek, *Die Erklärung der Menschen-und Buergerrechte*, p. 10.

[82] Cf. Larousse, *Dictionnaire Universel* under "La Rochefoucauld"; Borgeaud, *Etablissement et Révision des Constitutions en Amèrique et en Europe*, Paris, 1893, p. 27.

the American "philosopher" increased his fame and reputation. There was no doubt in France then, and there is little among historians there to-day, that he was the real author of this document. It was everywhere in Europe a subject of admiration by those who were identified with the literary movement which was preparing the way for the French Revolution, and which was then at the height of its authority,[83] and they were the leaders of the Revolution who at Franklin's death stopped in the midst of their horrible career of tyranny and murder to eulogize his memory.

A meeting was arranged in Paris between Voltaire and Franklin, of which there are different versions. These two apostles of liberty, the old French patriarch, and the simple friend of the people from America, the first to give their literary theories practical form in the new republic of Pennsylvania, embraced each other amid the plaudits of a large number of onlookers.[84] The interest which the liberal writers of Europe had expressed in Pennsylvania, however, according to Laboulaye, antedated Franklin's appearance upon the scene in Paris. William Penn had been regarded as a lawgiver so wise and tolerant, that now it was the most natural thing in the world for the State to abolish the representative system, which it had almost done in the Constitution of 1776, and to restore the people to all their "natural" rights and privileges. It was Penn's peculiar service to the liberal cause, we are told, which "explains and justifies the admiration of the last century for the Republic of Pennsylvania. Penn was for the writers of the eighteenth century a philosopher rather than the leader of a sect. Philadelphia was the city of toleration; Pennsylvania was the promised land of the philosophers. * * * In two words, what Utopia was

[83] Cf. Mignet, *Vie de Franklin*, 12th edition, Paris, 1885, pp. 111 *et seq.*; P. A. Changeur, *Comment on devient un homme*, 1894, p. 256, Laboulaye, *Histoire Politique des Etats Unis*, Tome I, pp. 367 *et seq.*

[84] A most dramatic account of this incident is contained in Belot, *Benjamin Franklin, Chef de la Democratie Americaine*, Lyons, 1886. Cf. Adams' *Works*, Vol. III, p. 147, and "Life of Voltaire", by Condorcet, *Oeuvres Complete*, Vol. C, p. 161.

to Thomas More and Salentum to Fenelon, Pennsylvania was to Voltaire ".[85]

It was about this time, too, that a print had appeared in France. It was sent on to America, having been designed and executed, it is said, by a "celebrated hand". It was entitled "Doctor Franklin, Crowned by Liberty". It exhibited a bust of Franklin being crowned by laurel leaves. At his right hand was a globe with the Continent of America in view. In the background and leaning on the globe, was a figure which was described in the newspapers of the period as "the genius of the Doctor" with the sword of justice in its right hand, while in its left hand, falling open over the globe, was a scroll upon which was inscribed the words "Constitution of the government of Pennsylvania ".[86]

To me it does not appear likely that the French philosophers were wholly indebted to Pennsylvania for their opinions in respect of government, as enthusiastically as they received Franklin's Constitution, and studied it as the true expression of democracy. It scarcely seems safe, therefore, to go so far as Professor Jellinek[87] would take us, by inference at least, in making America the leader in the democratic movement of the eighteenth century, since Turgot, Condorcet and the Duke de La Rochefoucauld were scarcely the disciples of Franklin. They were his friends, because it would appear of what they thought he represented, not for what they actually knew about his politics. He was influenced, in all likelihood, very much more by them than they by him, a conclusion from which there is no apparent avenue of escape.

It was Turgot that in March, 1778, wrote a letter to Dr. Richard Price, an English political writer, who had taken an interest in constitutional subjects at this time, attacking the American Constitutions, in that there was "an unreason-

[85] Laboulaye, *op. cit.* Tome I, pp. 370-71. See, too, Voltaire's amusing apostrophe to the Quakers in his *Dictionnaire Philosophique*,—Article on the Quakers.

[86] Article in *Pennsylvania Packet*, March 30, 1779. [87] *Op. cit.*

able imitation of the usages of England". Different bodies were established, the sovereignty was divided, and they had then tried to balance these different authorities. But one Constitution, that of Pennsylvania, seems to have met with M. Turgot's admiration.[88] It was this letter which led Adams to write his spirited "Defence of the Constitutions of the United States of America against the attack of M. Turgot", etc., a work in three volumes, which exerted an important influence in the Federal Convention of 1787. It is an historical writing upon which the author expended a very great deal of effort, while representing the American States at London.[89]

[88] Adams' *Works*, Vol. IV, p. 278.

[89] In a letter to John Taylor Mr. Adams says: "M. Turgot had seen only the Constitutions of New York, Massachusetts and Maryland, and the first Constitution of Pennsylvania. His principal intention was to censure the three former. * * * The drift of my whole work was to vindicate these three Constitutions against the reproaches of that great statesman, philosopher and really excellent man, whom I well knew". —*Works*, Vol. VI, p. 486. Again he says: "Franklin, Turgot, Rochefoucauld and Condorcet, under Tom. Paine, were the great masters of that academy" [the School of folly].—*Ibid.*, Vol. VI, p. 403. Nowhere else has Adams summed up his work in combating the French philosophy so well as in the following passages: "In 1775 and 1776 there had been great disputes in Congress and in the several States, concerning a proper constitution for the several States to adopt for their government. A Convention in Pennsylvania had adopted a government in one representative assembly, and Dr. Franklin was the President of that Convention. The Doctor, when he went to France in 1776, carried with him the printed copy of that Constitution, and it was immediately propagated through France that this was the plan of government of Mr. Franklin. In truth, it was not Franklin, but Timothy Matlack, James Cannon, Thomas Young, and Thomas Paine, who were the authors of it. Mr. Turgot, the Duke de La Rochefoucauld, Mr. Condorcet and many others, became enamored with the Constitution of Mr. Franklin. And in my opinion, the two last owed their final and fatal catastrophe to this blind love. In 1780, when I arrived in France, I carried a printed copy of the report of the Grand Committee of the Massachusetts Convention, which I had drawn up; and this became an object of speculation. Mr. Turgot, the Duke de La Rochefoucauld, and Mr. Condorcet and others, admired Mr. Franklin's Constitution, and reprobated mine. Mr. Turgot in a letter to Dr. Price, printed in London, censured the American Constitution as adopting three branches in imitation of the Constitution of Great Britain. The inten-

Mirabeau followed Turgot in a pamphlet enforcing the views of the latter in respect of the merit of a simple centralized government. Condorcet's sympathy with the same philosophy is not to be mistaken, and his sentiments may be gleaned from more than one of his writings.[90] The Duke de La Rochefoucauld was a firm believer in the same principles and in his Eulogy of Franklin in 1790, in speaking of the American philosopher's political views, gave him unmeasured praise for the authorship of the Pennsylvania Constitution. The Duke on this occasion said: "Franklin alone disengaging the political machine from those multiplied

tion was to celebrate Franklin's Constitution and condemn mine. I understood it, and undertook to defend my Constitution, and it cost me three volumes. In justice to myself, however, I ought to say that it was not the miserable vanity of justifying my own work, or eclipsing the glory of Mr. Franklin's that induced me to write. I never thought of writing till the Assembly of Notables in France had commenced a revolution with the Duke de La Rochefoucauld and Mr. Condorcet at their head, who I knew would establish a government in one assembly, and that I knew would involve France and all Europe in all the horrors we have seen; carnage and desolation for fifty, perhaps for a hundred, years. At the same time every western wind brought us news of town and county meetings in Massachusetts, adopting Mr. Turgot's ideas, condemning my Constitution, reprobating the office of governor, and the assembly of the Senate, as expensive, useless and pernicious, and not only proposing to toss them off, but rising in rebellion against them. In this situation I was determined to wash my hands of the blood that was about to be shed in France, Europe and America, and show to the world that neither my sentiments nor actions should have any share in countenancing or encouraging any such pernicious, destructive and fatal schemes. * * * I was personally acquainted with Mr. Turgot, the Duke de La Rochefoucauld and Mr. Condorcet. They were as amiable, as learned and as honest men as any in France. But such was their inexperience in all that relates to free government, and so obstinate their confidence in their great characters for science and literature, that I should trust the most ignorant of our honest town meeting orators to make a Constitution, sooner than any or all of them".—John Adams' letter to Samuel Perley, June 19, 1809, *Works*, Vol. IX, pp. 621 *et seq.* Cf. *ibid.*, Vol. IV, p. 389.

[90] See particularly *Quatres lettres d'un Bourgeois de New Haven, sur l'Unité de la Legislation* which drew out Adams' *Discourses on Davila*. These four letters are published in the first volume of Mazzei's *Recherches historiques et politiques sur les Etats Unis de l'Amèrique septentrionale;* cf. also Condorcet's *Eloge de Franklin.*

movements, and admired counterpoises that rendered it so complicated, proposed the reducing it to the simplicity of a single legislative body. This grand idea startled the legislators of Pennsylvania, but the philosopher removed the fears of a considerable number, and at length determined the whole to adopt a principle which the national assembly has made the basis of the French Constitution". In a note to the above passage in the printed edition of his oration, the Duke de La Rochefoucauld, on the subject of a single legistive assembly, added the following remarks: "Franklin was the first who dared to put this idea into practice. The respect the Pennsylvanians entertained for him induced them to adopt it; but the other States were terrified at it, and even the Constitution of Pennsylvania has since been altered. In Europe this opinion has been more successful.[91] When I had the honor to present to Franklin the translations of the Constitutions of America the minds of people on this side the Atlantic were scarcely better disposed toward it than those on the other side; and if we except Dr. Price in England, and Turgot and Condorcet in France, no man who applied himself to politics agreed in opinion with the American philosopher. I will venture to assert that I was of the small number of those who were struck with the beauty of the simple plan he traced, and that I saw no reason to change my opinion when the national assembly led by the voice of those deep thinking and eloquent orators who discussed that important question, established it as a principle of the French Constitution that legislation should be confided to a single body of representatives. It will not perhaps be deemed unpardonable to have once mentioned myself at a time when the honor I have of holding a public character makes it my duty to give an account of my sentiments to my fellow citizens. France will not relapse into a more complex system, but will assuredly acquire the glory of maintaining that which she has established, and give it a degree of perfection, which,

[91] Rochefoucauld himself soon after met his death from a mob, as a result of the success which the "opinion" gained in France.

by rendering a great nation happy, will attract the eyes and the applauses of all Europe, and of the whole world." [92]

Such eloquent words would have better graced a worthier cause than this one, which had already been wholly discredited in Pennsylvania, and was leading France into a period, the darkest and gloomiest in her whole history. The sympathy the members of this group felt, the one for the other, is indicated in Franklin's correspondence in a letter dated Paris, February 8, 1786,[93] after his return to America, and his election to the Presidency of Pennsylvania, which the "Constitutionalists" and "Anti-Constitutionalists" united in, asking him to accept.[94] In complimenting Franklin upon the resolution he had shown in the face of the demands which had been made upon him, and transmitting the friendly regards of Condorcet, the Duke de La Rochefoucauld said: "I know that two powerful and nearly equal parties support different principles as the basis of the Constitution; but nobody is better qualified than yourself to conciliate both of them, and to obtain not perhaps the Constitution, most absolutely perfect, but at least, as Solon said, the best which your fellow citizens are able to bear. This is the critical moment for the Americans. The return of peace and the certainty of independence demand of them a general revision of their laws, and the formation of new codes, no longer a servile imitation of the laws of England, but dictated by reason, conformed to their actual situation, and adapted to insure the happiness of states and individuals. In legislation you must be the teachers of the world."

In two letters to his friend in France, M. LeVeillard, who

[92] *Memoirs of the Life and Writings of Benjamin Franklin*, by Wm. Temple Franklin, London, 1818, Vol. I, p. 303. Temple Franklin says here that the Pennsylvania Constitution of 1776 "may be considered as a digest of Dr. Franklin's principles of government. The single legislature and the plural executive appear to have been his favorite tenets."

[93] Sparks, Vol. X, p. 247.

[94] Cf. Letter of Franklin to the Duke de La Rochefoucauld, Phila., April 15, 1787, in Temple Franklin's Collection Vol. II, p. 97.

was another loyal adherent of the same philosophy, Franklin expresses his views regarding the plan for two chambers in the Federal system, as arranged for by the new Constitution of the United States, of 1787. In the first letter, he says: "I am of opinion with you that the two chambers were not necessary, and I disliked some other articles that are in the proposed plan".[95] And in the second letter he says: "As to the two chambers, I am of your opinion that one alone would be better, but, my friend, nothing in human affairs and schemes is perfect, and perhaps this is the case of our opinions."[96]

If any further evidence were needed to indicate what were Franklin's sympathies at the time of the adoption of the Pennsylvania Constitution, or what they had come to be as a result of his long residence in France, it should be supplied in a paper attributed to Franklin, and published as his in William Temple Franklin's collection of his writings,[97] under the rubric "Queries and Remarks on a paper entitled 'Hints for the members of the Convention'". These "Hints" were originally published in a newspaper appearing in Carlisle, Pa., being reprinted in the *Federal Gazette,* November 3, 1789, and also in some of the other Philadelphia journals. The articles were signed "A Farmer", and were strongly written arguments for a revision of the Constitution of the State of Pennsylvania, so that its form would be put in harmony with the other American governments. To these a reply, ascribed to Dr. Franklin, was addressed, and it is a defence of the Constitution of 1776, so vigorously worded that if it is an authentic document, which, from its style it would appear to be, there can be no question raised hereafter as to Franklin's true position respecting two legislative chambers.[98]

[95] Letter to LeVeillard, dated Phila., April 22, 1788, in Temple Franklin, Vol. I, p. 391.

[96] Letter to LeVeillard, Phila., Oct. 24, 1788, *ibid.* Vol. I, pp. 395-96.

[97] Vol. I, Appendix no. 9.

[98] The writer has been unable to find these "Queries and Remarks"

Assuming that Franklin was the author of this paper, which it seems perfectly safe to do, we find that here again he defended the plural executive, and doubted the expediency of placing a single individual in such a place of power as the Governor's seat. It was desired that Pennsylvania should have a Governor like the other States, a system which Franklin professed to think would gravely imperil democratic institutions. In order to secure "independence and stability of administration", it had been asserted that the chief magistrate should be "beyond the reach of every annual gust of folly and of faction". "Does not this reasoning", Franklin inquired, "aim at establishing a monarchy at least for life, like that of Poland?"

In respect of the legislature of two chambers, Franklin pointed to the unfortunate experiences which the colony had had with a second branch, in which the proprietary family and the aristocratic element were often successful in defeating the popular will. The influence which the unusually prolonged and bitter contests with the proprietors had exerted upon Franklin's mind, and no doubt upon the minds of many other men who were now the advocates of a single house of assembly in Pennsylvania, is here clearly indicated. "How many delays," he says, "and what great expenses were occasioned in carrying on the public business, and what a train of mischiefs, even to the preventing of the defence of the province during several years, when distressed by an Indian war, by the iniquitous demand that the proprietary property should be exempt from taxation!" [99] He predicted long disputes between the chambers, were there two co-equal in authority, and pointed to the experience in some neighboring States, where with two bodies serious deadlocks then existed.

The rather amusing suggestion was offered that so little public wisdom might be at hand, that were it divided be-

among any of the other collections of Franklin's writings. As the paper is so positive and unequivocal in its language, an investigation as to its source would be an interesting historical study.

[99] Cf. Laboulaye, *op. cit.*, Tome I, p. 367.

tween two houses, each would perhaps be "too weak" to "support a good measure or obstruct a bad one". The presence of a plural legislature in England was due, he argued, to the "pre-existing prevalence of an odious feudal system". The proposal that the two branches should be elected by different interests, one representing wealth, the other being a more popular body, he found to be "contrary to the spirit of all democracies". With two houses there was an assumption "that wisdom is the necessary concomitant of riches". He illustrated his dislike of two chambers by telling another characteristic anecdote. "Has not the famous political fable of the snake with two heads and one body some useful instructions contained in it?" he inquired. "She was going to a brook to drink, and in her way was to pass through a hedge, a twig of which opposed her direct course. One head chose to go on the right side of the twig, the other on the left, so that time was spent in the contest, and before the decision was completed, the poor snake died of thirst".

Franklin concluded this rather passionate defence of the existing Constitution of Pennsylvania as follows: "I am sorry to see a disposition among some of our people to commence an aristocracy, by giving the rich a predominancy in government, a choice peculiar to themselves in one half the legislature to be proudly called the *upper* house, and the other branch chosen by the majority of the people degraded by the denomination of the *lower,* and giving to this upper house a permanency of four years, and but two to the lower I hope, therefore, that our representatives in the Convention will not hastily go into these innovations, but take the advice of the prophet,—'Stand in the old ways, view the ancient paths. Consider them well; and be not among those that are given to change'".

It would be hard to think of any quotation of which Franklin was so fond, more inappropriate in this connection, than an appeal now "to stand in the old ways", if he meant this to be an argument for the retention of a Constitution which was one fabric of innovations. Throughout all these

thirteen years since it had been adopted, the chief objection to it had been that it was new, and in total disaccord with the habits, desires and traditions of the British people, of which the Pennsylvanians were still a living branch. The Declaration of Independence had not made them over again. It was not more possible then, than it is to-day, to " create " constitutions, and to introduce legal and political forms which have no basis in the empirical knowledge of men as they conduct themselves, in reference to other men as members of society. Therefore, we may conclude, if our testimony here is trustworthy, that whether or not Franklin had a direct part in originally framing the Constitution of Pennsylvania of 1776, he was at any rate a loyal defender of its principles.

Franklin's character in a general way is a hackneyed theme. Considerations as to his life and influence do not concern us here, except as they tend to show the close connection which existed between French and American thought at this period, thus giving us a clearer insight into a most peculiar phase of the development of popular government in this country. It seems to be accepted that what Franklin achieved in France, in securing that nation's aid in behalf of the colonies, was not due to his friendship for two chambers or one chamber of legislature, or " liberty ", or the French school of philosophy, which then appears to have had no representative in the government, M. Turgot having already been dismissed from his high place in the state. In the cabinet of Louis XVI. " generosity of spirit or sympathy with liberty was not even thought of " as a motive for the alliance with the American states.[100] France's course was determined on in order to humiliate and break the power of Great Britain. There may have been other considerations which impelled French volunteers to cross the ocean and enlist under the American standard, but that is quite a different matter. It would be a mistake not to make allowance for the fact that Franklin's universal reputation as a philosopher, had constituted him a much more useful representative of this gov-

[100] Chas. Francis Adams' " Life of John Adams ", *Works*, Vol. I, p. 309.

ernment in France, than he otherwise could have been. How his fame had been gained, would form a rather curious study, though it could not affect the result, and history has definitely assigned him a high place among the founders of the American nation. To regard him as a scientist and philosopher, which was the habit of the time, would reflect very greatly upon the state of the development of science and philosophy in the 18th century. Neither, of course, then enjoyed a very high position, as we understand the terms to-day. The physicists would scarcely now claim Dr. Franklin as an exponent of their science, and yet he was regarded by large numbers of people at that time, as a greater one than Newton. No one would think of placing Franklin's name among the immortals in a history of philosophy, a peer of Leibnitz, for instance, with whose name his was often coupled also.

If philosophy is the science of all the sciences, as we are disposed to think to-day, it is not likely that Dr. Franklin could have been a master in this great empire of knowledge. His own early education was deficient, as Mr. Charles Francis Adams somewhere observes in explanation of Franklin's erratic ideas on many subjects. If we view him as a political philosopher, Mr. Adams' words seem almost too charitable, and yet among philosophers, none then appeared to have more general appreciation and respect, either in this country or in Europe. He was himself the member of learned societies abroad, and nearly all his friends in France were proposed for and elected to membership in his Philosophical Society in Philadelphia. His scientific reputation was truly a "phenomenon" as Mr. John Adams says in one of his amusing estimates of the man.[101] Leibnitz, Newton, Frederick of Prussia and Voltaire, all seemed like lesser stars in the firmament to great multitudes of people.[102] The fe-

[101] Adams' *Works*. Vol. I, p. 649, Appendix, Adams' letter to Boston *Patriot* in 1811.

[102] "His name was familiar to government and people, to kings, courtiers, nobility, clergy and philosophers, as well as plebeians, to such a degree that there was scarcely a peasant or a citizen, a valet de chambre, coachman or footman, a lady, chambermaid or a scullion in a

male sex knew his name in connection with the service he rendered them in increasing their assurance during thunderstorms, by reason of the iron points which he placed upon buildings to lead the lightning down. The printers all claimed him as one of their guild, and they eulogized him in whatever country newspapers were published. He was looked upon as the friend of all churches, and again as a French atheist.[103] In politics he was always a friend of government in its most popular forms, a politician wherever he turned, rather than a scientist or a great statesman whose work will live through time, as universally familiar as his contemporaries were with his name. It would be a serious error, therefore, to underestimate Franklin's influence in America and in France and to allege that he was not a powerful factor in shaping the political ideas of his fellow men, who, in many circles, respected him so highly, if we can show that he had definite convictions in regard to the philosophy of government, which has been the sole object of the studies that have resulted in my writing the present chapter.

kitchen, who was not familiar with it, and who did not consider him a friend to human kind. When they spoke of him, they seemed to think that he was to restore the golden age. * * * To develop that complication of causes which conspired to produce so singular a phenomenon, is far beyond my means or forces. Perhaps it can never be done without a complete history of the philosophy and politics of the eighteenth century. Such a work would be one of the most important that ever was written; much more interesting to this and future ages, than the 'Decline and Fall of the Roman Empire', splendid and useful as that is."—*Works,* Vol. I, p. 660.

[103] *Ibid.*

CHAPTER II

THE DOWNFALL OF FRANKLIN'S GOVERNMENT IN PENNSYLVANIA

The Pennsylvania Constitution of 1776 was destined to have an unusually chequered career, all of which may be only briefly outlined here. A considerable number of the members of the Convention had refused to sign it, in this way expressing their dissatisfaction with the instrument. Among the number were George Ross, the Vice-President of the Convention, who presided in Franklin's absence, and George Clymer. Very vigorous opposition to the Constitution was developed in Philadelphia, so soon as the frame of government was made public. Thomas McKean, who was the President of the provincial conference from which the convention derived its powers, and of whom it was said that without book or written document of any kind, he one night drew up an instrument of government, which, with very little change, was approved and adopted as the Constitution of the State of Delaware,[1] John Dickinson, Dr. Benjamin Rush, Colonel John Bayard and James Wilson, to name but a few of the eminent men of the city numbered among the Anti-Constitutionalists, openly expressed their dissent with the new principles. Public meetings were called, and were largely attended, resolutions were adopted, and many objections to the new Constitution were stated *in extenso*. It was declared "That the said Constitution differs not only unnecessarily from that to which the people have been accustomed, but in many important articles from every government that has lately been established in America on the authority of the people, from the sentiments of the honorable Continental

[1] Called for this reason the "Lycurgus of Delaware State". Cf. article in *Pennsylvania Gazette*, October 30, 1776.

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Congress respecting government, from those of the most distinguished authors who have deliberately considered that subject".[2]

It was proposed in order to defeat the purposes of the Convention, and secure, if possible, another government, that at the first election under the Constitution, which was to occur on November 5, 1776, the electors and election officers should refuse to take an objectionable oath of fealty to the State which the Convention had prescribed:[3] that the assemblymen when they should be elected, should not take an offensive religious oath, which was too liberal, and was considered to look toward atheism.[4] It was recommended that councilors should not be chosen at the elections in November, of which officers it will be noted each county was to return one. The new Assembly, it was declared, ought to have "full powers to make such alterations and amendments" in the Constitution as the members might consider to be necessary and proper.[5]

As a consequence, in the elections of November in Philadelphia city and Philadelphia county, the oaths were omitted, and councilors were not chosen,—quite in accordance with the plan which had been concertedly agreed upon. Anti-Constitutional candidates were elected to the Assembly, and it was understood that when they met they should at once proceed to a revision of the Constitution. From other parts of the State, however, candidates who viewed the Constitution with greater favor, were returned, though it is said that not more than 2,000 voters exercised the suffrage throughout the entire State.[6]

[2] Resolutions of meeting in the State House yard, Philadelphia, October 21-22, 1776; cf. *Pennsylvania Gazette*, October 23, 1776.

[3] Section 40 of Constitution. Also ordinance of convention, in Minutes of Convention, p. 56.

[4] Sec. 10 of the Constitution; cf. Resolutions of the meeting in the State House yard, sec. 26.

[5] *Ibid.*

[6] "This Constitution was no sooner published, than it was reprobated by a great body of the people. Some of the members of the convention

When the Assembly met, the opponents of the Constitution were strong enough, to effect one thing at least. By refusing to take their seats, they could prevent the house from organizing. John Dickinson, who led the Anti-Constitutionalists, seeing that there was no prospect of amending the Constitution through the Assembly, early in the session made the following proposition:

"On behalf of myself and of others of my constituents, I agree that we will consent to the choice of a Speaker, sit with the other members, and pass such acts as the public affairs may require, provided that the other members, the majority, will agree to call a free convention for a full and fair representation of the freemen of Pennsylvania, to meet on or before the —— day of January next, for the purpose of revising the Constitution framed by the late Convention, and making such alterations and amendments therein as shall by them be thought proper," etc. The proposal having not been received with favor by the majority of the members,

who composed it were insulted upon returning to their respective counties. Unfortunately for the State, General Howe invaded New Jersey, and pointed towards an attack upon the capital of Pennsylvania about the time fixed upon by the convention for the election of an assembly to execute the Constitution. A government of some kind became necessary to collect the force of the State to resist the approaching enemy. About two thousand voters only appeared in favor of an assembly. The members chosen took their seats, and after setting aside several parts of the Constitution which they had previously sworn to maintain, they undertook to execute the parts of it which remained. So obnoxious was the Constitution to the best men in the State, that the Executive Council, after tempting a number of them with the first offices in the government to no purpose, were obliged to call a Chief Justice and an Attorney General from the neighboring States."—*Pennsylvania Packet,* Feb. 2, 1779. "It was in vain that some men of more prudence and foresight in the convention objected to many parts of the proposed Constitution in every stage of its progress. It was carried as it now appears, in heat and in haste. Necessity, the tyrant's useful plea, was urged for carrying it into immediate execution, without submitting it to the discussion or sovereign sanction of the people. Scarce a twentieth part of the people would countenance the Constitution by giving a vote under it at the first election."—Article in *Pennsylvania Packet,* Feb. 6, 1779.

Dickinson and several of his colleagues withdrew from the house, which had the result of breaking a quorum.

The situation was so grave, however, by reason of the approach of the British army, that the Continental Congress, in the absence of any organized authority in the State, threatened to intervene and establish a provisional government. The contending factions therefore agreed to elect a speaker, and proceed to the transaction of business, though Dickinson and his immediate following still refused to occupy their seats. Writs were issued by the speaker in February, 1777, for the election of members in their places. Councilors and other officers were also chosen at special elections, and on March 5, 1777, the Council and the Assembly, having met together in the manner contemplated by the Constitution, elected the first President and Vice-President of the State, and they were inducted into office with some ceremony.[7]

This appearance of vigor in the new government, however, did not have the effect of allaying the popular uneasiness and distrust, and the agitation for a new Constitution was soon renewed. The Whig Society, of which Paine, Cannon and Young were active members, was organized to oppose the anti-constitutional movement. In the spring of 1777, the threatening attitude of the British army once again occasioned alarm to Congress, and on April 14 it was resolved that the subject was so important as to require Congressional superintendency and oversight. On April 15 a committee of Congress to which the matter had been referred, reported that "the executive authority of the Commonwealth of Pennsylvania is incapable of any exertion adequate to the present crisis", which the Anti-Constitutionalists at once took to be an absolute condemnation of the new government. "Weakness and languor are apparent in every part of the government. There is no regular administration of justice, whereby

[7] Thomas Wharton, Jr., councilor for Philadelphia County, was elected President, and George Bryan, councilor for Philadelphia city, Vice-President.

the enemies of our country may be punished and its friends protected", said a number of petitioners who addressed "the President of the Executive Council and the Board of War [8] for the State of Pennsylvania", on May 6, 1777. They asked therefore "that as soon as the Assembly shall meet, application be made to them to recommend the election of a new Convention for the purpose of altering and amending the Constitution". The Board of War, Richard Bache, Chairman, on May 14, replied to its petitioners that it heartily approved of the proposition as a "salutary and necessary measure".

The Supreme Executive Council itself on June 11, addressed the Assembly as the Board of War had done a few days earlier. In this communication, the councilors declared that "they are sorry to find the present Constitution of the State so dissatisfactory to any of the well-affected inhabitants thereof, and would gladly concur in any suitable and safe measure for the removal of this uneasiness; that they are of the opinion this might be greatly attained by taking the sense of the majority of the electors throughout the counties on the important question whether a Convention be holden at some proper time to reconsider the frame of government formed by the late Convention; that to fix the exact mode of obtaining the mind of the majority on the subject most properly belongs to their representatives; that the Council hope that if some suitable mode of advising and getting the people at large to declare themselves, and if this were advised and published at this time, great ease and relief would thereby be given to some persons who are dissatisfied as aforesaid; and that unanimity in the common cause so necessary at this time, will be promoted". [9]

Even the Whig Society, which of course engaged itself in an effort to defeat the movement for a new Constitution, was now favorable to a plebiscite on this subject, as it or its suc-

[8] A State Military Board appointed by the Supreme Executive Council. There was also a "Navy Board".

[9] *Colonial Records*, Vol. XI, p. 220.

cessor, the Constitutional Society, did not find it expedient to be at a later date.[10] The Whig Society asked the Assembly if the worst happened, at least to "take the necessary steps for collecting the sense of the State previous to any such recommendation"—*i. e.*, a "recommendation" to the people to elect a new Convention. The Assembly on June 12 entered upon the immediate consideration of the project, and resolved that it would "recommend it to the inhabitants of the Commonwealth to give their sense of the present dispute respecting the calling of a Convention". A committee was appointed to devise and propose a plan by which this "sense" should be ascertained, and the Assembly upon receiving its report, determined on June 17 to submit the question to the people, their answer to be given directly by a yea and nay vote.

It is of interest to note how this early plebiscite in Pennsylvania was to be taken. The freemen of each township, borough, ward or other local district, when they next chose their "inspectors" for the election of members of the Assembly, were to select "commissioners", one for each local district. The duties of these "commissioners" were rather ambiguously defined in the law as follows:

"To go to the house or place of residence of each and every freeman entitled to vote for members of General Assembly within their respective townships, boroughs, wards or districts, or to take some other opportunity of meeting with them. The said commissioner shall ask each and every of the said freemen whether he desires that a convention be now called, and the freeman shall give in writing on a scroll or piece of paper, his vote or answer, which he shall put into a box provided for that purpose, which he shall keep shut and in his own possession, and return the same on or before the tenth day of November to the sheriff of the city or county to which he belongs, or in case of the death, sickness or absence of the sheriff, to the coroner, who, with the assistance of the said commissioner, shall examine the said box or bag,

[10] Cf. *infra*, p. 53.

and cast up the number of votes therein contained on each side of the question, and the sheriff or coroner shall deliver to such commissioner a certificate of the said numbers, and also return a true account thereof, under the hands and seals of the said sheriff or coroner, and of the said commissioner, to the next General Assembly at their first sitting."[11]

As the State soon became the center for the military operations of a considerable portion of the British army, the plebiscite could not be taken, but with the evacuation of Philadelphia by the enemy in 1778, expressions of dissatisfaction with the Constitution were immediately renewed. In November, 1778, the subject was again brought before the Assembly, and on the 28th day of that month, the house passed resolutions stating that whereas "divers petitions" had been presented to former assemblies "suggesting inconveniencies in the present Constitution and form of government", and asking for a submission of the question to the people, and whereas resolutions providing for such a vote had earlier been agreed to, but "the invasion of the State and other circumstances" had prevented it being carried into effect, another attempt would be made to get an expression of public opinion in April, 1779. The people were to vote by ballot the slips of paper containing the words "For a Convention", or "Against a Convention", as the preference of the voter might dictate. The members of the Convention were to be selected at the same time, so that the people would not be "put to the inconvenience of a second meeting", should a majority of the ballots be unfavorable to the existing Constitution. The Convention, in case the people should sanction it, was to meet at Lancaster on June 1, 1779.[12]

[11] *Journals of the Assembly*, p. 145.

[12] *Journals of the Assembly*, pp. 246-47. This resolution, which was passed November 28, 1778, provided, "That the people throughout this State qualified to vote for members of Assembly, do meet at the usual places of election since the late happy revolution, on the 25th day of March next, and choose judges and inspectors as by law directed in case of representatives. And the said judges and inspectors being so chosen and sworn as at the election of representatives, shall provide

Were the vote favorable to a Convention, it was provided that that body should determine on nine separate points. Those most vitally affecting the character of the Constitution, related to the division of governmental powers;—whether the legislature in the future should consist of one house or two; whether the executive authority should be strengthened and given a position more independent of the Assembly; whether the judiciary should continue to be the servant of the Assembly, and whether the anomaly called the Council of Censors might not better be abolished. It was still in Philadelphia that the most dissatisfaction was expressed in reference to the Constitution.[13] It was now, as at a later time, a favorite mode of defending the Constitution against every attack upon it to say that those who most desired to change it were "Tories". John Dickinson, James Wilson and Richard Bache, all were accused of their Tory inclina-

two boxes for the city and each district of every county; and on the first Tuesday of April next they shall receive the votes of the freemen qualified at the time of said election by law, to vote as aforesaid, making at the same time a list of the voters' names, and put into one box all the votes for and against a convention, the voters in favor of a convention writing on their tickets 'For a Convention', and those against it 'Against a Convention', and in the other box they shall put the votes for the members of such convention as that, if the majority of votes should be in favor of a convention, the minority may not be precluded from a choice in the persons who are to compose it, or the people put to the inconvenience of a second meeting". These boxes after the meeting had adjourned were to be sealed, and delivered by the election officers to the sheriffs at the court houses of the respective counties, who then should take them up to the Assembly where the boxes would be opened, and the ballots counted. "If a majority of votes shall appear to be against a convention, then no further proceedings shall be had, but if a majority of votes shall be for a convention, the Assembly shall then proceed to open the boxes containing the names of the members for the city and county, and shall declare the six highest in number from each city and county to be the members to represent the said city and county in convention."

[13] Cf. *Pennsylvania Packet*, Jan. 21, 1779. A correspondent replying to the assertion that a majority of the citizens of Philadelphia were in favor of the Constitution, said that "nothing could be farther from the truth", and added that "at every general election" held in this city since the formation of the present Constitution, Anti-Constitutional members have been returned.

tions, whenever they exerted themselves in behalf of a change in the system of government in Pennsylvania.[14]

This very cheap and successful method of "campaigning" was used with effect against John Adams and other Americans, very loyal and in the highest degree useful to their countrymen, who could well afford to let their enemies stamp and fume if their services could be of any value in saving the new nation from such a democratic upheaval as was soon to fall to the lot of the foolish people of France. It was not the Tories who were leading the movement against this unrighteous Constitution, but, a great branch of the Whig or American party, for the Tories were safely enough shut out from any part in political affairs during this period. The Whig party in Pennsylvania was cloven through and through on the constitutional issue, being almost equally divided in numbers into the Constitutional and the Anti-Constitutional, or so-called "Republican" factions, an alignment which continued until the new convention met in 1790, when the government of the State was made to conform to the common American model.

The Constitutionalists conducted such a campaign through the counties, circulating petitions and assembling the names of remonstrants against the plebiscite which had been set for April, 1779, that the Assembly weakened at the last moment, although the resolution authorizing the vote of the people had been passed unanimously by the same Assembly in the preceding November.[15]

[14] Dickinson defended himself in a public address, *Pennsylvania Packet*, Dec. 31, 1782; James Wilson in *Pennsylvania Packet*, October 17, 1780. Cf. Article of Timothy Matlack in *Pennsylvania Packet*, March 30, 1779, for an attack upon Mr. Bache, at that time President of the so-called "Republican Society"—an Anti-Constitutional Club.

[15] Familiar methods were used in the country districts to prejudice the people against the convention. Assertions were made, as they were afterward and before, that it was an attempt to establish a hateful "House of Lords"; cf. Address of Republican Society, signed by Richard Bache, Chairman, *Pennsylvania Packet*, March 25, 1779, in which he asked: "Were you not told when the petitions were presented to you that the opposition to the Constitution arose and was supported

The members of the Assembly, it was said, had taken the oath to support the Constitution, as it was prescribed that they should do in that instrument, and yet they had inconsistently voted for a convention to change it.[16] If change were needed, there was a method by which this could be effected,—namely, through the Council of Censors. A convention called by any other authority would be extra-constitutional.[17] A single remonstrance containing the names of 3743 inhabitants of Lancaster County, was received in the Assembly,[18] and altogether signatures to the number of 16,000, at least, seem to have been secured,[19] enough in any case to induce the house on February 27, 1779, only a few weeks before the date fixed for the plebiscite to rescind its earlier action by a vote of 47 yeas to 7 nays.[20] "Whereas a very considerable number of the inhabitants of this Commonwealth are much dissatisfied with the said resolution," the Assembly declared in its repealer it had been induced to change its order for a popular vote, and thus the issue was postponed again, though the discussion was happily allowed to subside in some degree until the Council of Censors held its first regular meeting in 1783-84, when the argument was revived with all its original and indeed an increased asperity.

It was the time of the fantastic and the elegant in political philosophy, when the facts of life and the experience of the human race must take a place subordinate to style of expression and flowing language, which were often used to disguise

only by a junta of gentlemen in Philadelphia, who wished to trample upon the farmers and mechanics, to establish a wicked aristocracy, and introduce a House of Lords, hoping to become members of it?"

[16] *Pennsylvania Packet*, Feb. 4, 1779.

[17] *Ibid.*, March 2, 1779. [18] *Ibid.*

[19] Address of Richard Bache, *Pennsylvania Packet*, March 25, 1779. Here it is admitted that 16,000 signatures were received, though it was said that these represented only a third or fourth part of the inhabitants of the State, to which there was the pleasant retort that the other two-thirds or three-fourths were Tories. Cf. Address to the people by the minority members of the Council of Censors, *Pennsylvania Packet*, Jan. 27, 1784.

[20] *Journals of the Assembly*, pp. 323-324.

pleasant idealistic illusions. The Roman Censors were to meet every seven years, a "romantic" period, as a contemporary newspaper writer observed.[21] The literary age which produced Rousseau, Diderot, d'Alembert, Condorcet and even Franklin with all his rustic crudity was an age of elegance. The Pennsylvania Constitution was a product of this literary apriorism, and after tasting of the viands we must feel somewhat nauseated as Adams did when he had attended this strange feast in France. "I am no enemy of elegance", Mr. Adams explained, "but I say no man has a right to think of elegance till he has secured substance, nor then to seek more of it than he can afford."[22]

In 1783 when the date had arrived for each county to return two members to the Council of Censors, whose duty it would be to ascertain whether or not the Constitution had been "preserved inviolate in every part", the two parties in Pennsylvania put forth strenuous efforts. The Anti-Constitutionalists seemed at first to be triumphant. It was alleged, however, that in Philadelphia, soldiers from other States, quartered in the city, had been allowed to vote; that they were "assembled together by beat of drum on the day of the election, and marched with officers at their head toward the State House"; that the judges and inspectors were "overawed"; that "the officers of the army attended at the windows with their swords in their hands, and the sergeants were employed in distributing tickets", etc.[23] By a vote of fourteen to seven, however, the Council of Censors determined that the election of two censors for the city of Philadelphia was "agreeable to the laws of this State", and by fourteen to eight that there was "no legal cause for setting aside the said election".

[21] This term was doubtless suggested by the septennial parliamentary period in England, and seems to have been an idea, therefore, of British rather than French lineage.

[22] *Works*, Vol. I, p. 433.

[23] Petition to the Council of Censors by certain Constitutionalists in Philadelphia, *Pennsylvania Packet*, January 10, 1784. Also *Journal* of the Council of Censors, p. 22.

Upon the announcement of this decision the eight members in the minority issued a long manifesto or protest, which was entered on the minutes of the Council,[24] the President of which was F. A. Muhlenberg, afterward the first Speaker of the House of Representatives of the United States. The censors instead of setting themselves to the task of determining whether or not the Constitution had been "preserved inviolate", and the various departments of the government had kept themselves within their rightful limits, at once took measures looking to a call for a new convention. The Council could issue such a call, of course, on a vote of its members. The Constitutionalists had been the loudest in their appeals to the Constitution, as a means of accomplishing its own reform in 1778 and 1779, but they now resisted the movement with all the force they could command.[25] The report of the "Committee on the Defects and Alterations of the Constitution"[26] was a masterly statement of the various arguments against the Pennsylvania Constitution, and it deserves a high place among the archives of government on this continent.

Respecting the single house of assembly, the report declared that the Constitution in this detail was "materially defective". A body of men upon whose action there was no veto, was a source of danger in the state; first, because if it should happen that a prevailing faction in that body were "desirous of enacting unjust and tyrannical laws, there would be no check upon their proceedings"; and second, because an "uncontrolled power of legislation will always enable the body possessing it to usurp both the judicial and the executive authority, in which case no remedy would remain to the people but by a revolution."

The division of the executive authority among so many persons; namely, the various members of the Executive Council, who with the formation of new counties had in-

[24] *Journal* of the Council of Censors, p. 26.

[25] Cf. an address to the people in *Pennsylvania Packet*, January 27, 1784.

[26] *Packet*, Jan. 24, 1784; *Journal* of Council, pp. 53 *et seq.*

creased until they now numbered thirteen, was also regarded as a defect. Some of the principal reasons for their opinion were developed in the committee's report, and it was alleged that the constant sitting of a Council was expensive and burdensome; that a numerous body of men does not possess the decision necessary for action in sudden emergencies; that if the Council be "weak or wicked" in its action, "there is no individual so accountable to the public as every man ought to be in such cases"; that since the President is chosen by the joint ballot of the Council and Assembly "if a prevailing faction should ever happen in the Assembly, so as to lead a considerable majority, the President thus chosen will have nothing to fear from the legislature, and by influencing the Council, would possess exorbitant authority without being properly accountable for the exercise of it".

In respect of the judiciary, it was said that this needed reform also, in the sense that now the terms were too short, the Supreme Court judges being commissioned for seven years only, and being removable at any time by the Assembly for "misbehavior". This was looked upon as a grave mistake in political policy, for "if the Assembly should pass an unconstitutional law, and the judges have virtue enough to refuse to obey it, the same Assembly could instantly remove them". The rotation of offices of inferior kinds, as provided for in the Constitution, the committee conceived to be an error, and this point was argued in a manner to do great credit to our ablest advocates of "civil service reform" at a later day.

The committee proposed that there should henceforth be a legislature of two houses, to be called the "Legislative Council", and the "Assembly". These together should be denominated "The General Assembly of Pennsylvania". The Council was alluded to as the "first branch", in order to avoid the distinctions of "upper" and "lower", which many considered so objectionable. Both houses were to be elected by the people, though on separate apportionments, the units of population in the case of the Council being larger

than for the Assembly. The assemblymen were to be elected annually; the councilors for periods of three years, one-third returning every year, in the general manner, later made so familiar to us in the Federal system, in respect of the United States Senate, it being as well the usual method employed in nearly all the State governments.

As for the executive power, there was to be a Governor annually chosen by the people. Each house, of course, was to have a negative on the measures of the other, and the Governor would possess a veto in reference to the work of both. The Governor was to appoint the judges, who were to hold office indefinitely, during "good behavior", a point, however, which the Assembly was no longer to determine upon its own responsibility. The Council of Censors, which was the object of much ridicule, was to be abolished.

This report was adopted by the Council of Censors, by a vote of twelve to nine, which was less than the constitutional two-thirds majority requisite to call a new Convention, wherefore the Council shortly adjourned, or "suspended its deliberations" to use its own term in this connection, in order to allow the question to be debated well by the people. The nine members who had dissented from the report issued a statement in defence of their course. In this peculiar document they said: "The alterations proposed will introduce a form of government much more expensive, burdensome and complicated;—but what we dread more than expense and delay, they tend to introduce among the citizens, new and aristocratic ranks, with a chief magistrate at their head, vested with powers exceeding those which fall to the ordinary lot of kings. We are sufficiently assured that the good people of Pennsylvania most ardently love equal liberty, and that they abhor all attempts to list one class of citizens above the heads of the rest, and much more the elevating any one citizen to the throne of royalty. And herein we are confident we speak not only the language of our constituents, but that we proclaim also the voice of God and nature." [27]

[27] *Journal* of Council, p. 75.

The majority, under Mr. Muhlenberg's leadership, on their side, issued an address to the people of Pennsylvania, which was adopted in the Council by a vote of twelve to ten. In this address it was stated that the minority of the Council did not represent one-third of the people in the State. Each county having equal representation, that is, two members, some of the least populous parts of the State acquired an undue strength. The address was a careful and rational statement of the case from the point of view of well informed and conservative men, and the people were asked seriously to consider the question of calling a new convention, making known to the Council their sentiments regarding the proposition before it should reassemble in a few months.[28]

The minority in the Council hereupon published a counter memorial to the people, which for rough democratic conviction, has perhaps never been excelled by any political document ever penned in this country. These fearless friends of popular rights appealed to the people in the following terms:[29] "Let no artful addresses of those aspiring despots who wish to establish and fill an upper house of lords amongst you, that they may thereby more effectually teach you submission to your betters, prevail with you to give up a Constitution which is the admiration of Europe, which attracts the attention of every friend of equal liberty in the world, and which will continue to brighten and grow illustrious as long as the lamp of science shall irradiate the Western world, and the genius of liberty protect its hardy sons from the encroachments of arbitrary power." The object which these "despots" desired to attain, our democrats explained, was the establishment of "an upper house to accommodate the *better sort of people,* and to vest them with full power to prevent any law from passing which a number of honest farmers from the country may judge to be salutary and beneficial to the State". And not only was the Senate a dangerous anti-popular device, but "your Governor or King (for it matters

[28] *Journal* of Council, p. 77.

[29] *Pennsylvania Packet,* Jan. 27, 1784.

not by what name you may call him) " would have " absolute power to put a negative on any bill which both houses may agree to enact ", whereby " you may finally despair of ever having it in your power, without bloodshed, to counteract an ambitious tyrant at the head of your government ". The public, too, was gravely assured that the Governor would have " greater legislative authority than the Kings of Great Britain ", while there would be established in the State an odious " aristocratic nobility ".[30]

Petitions and remonstrances were circulated assiduously by the two parties, and so hotly was the campaign prosecuted, that later in the year when the censors met again, the Constitutionalists had got control of the Council. Some vacancies which had occurred in the membership, had been filled. A few members who had earlier been in favor of a convention, were now against it, and on September 16, 1784, it was resolved by a vote of fourteen to ten [31] that " there does not appear to this Council an absolute necessity to call a convention to alter, explain or amend the Constitution ", and in an address to the people, on September 24, 1784, the censors announced that this action had been taken because of the great number of remonstrances which they had received.[32] In the election of members of the Assembly which followed, the Constitutionalists won a signal victory, securing a majority of twenty in the house,[33] which took occasion soon after it met, to express its firm attachment to the Constitution, " that great bulwark of equal liberty ".[34]

Franklin, who for nine years had been encouraging the

[30] Cf. *Pennsylvania Packet*, Feb. 12, 1784.

[31] *Journal* of Council, p. 163. [32] *Journal*, p. 177.

[33] In this campaign the constitutional issue was again confused with the question of loyalty to the general American cause. An attempt had been made to modify the so-called " Test Laws ", by which many Quakers and others suspected of Tory affiliations, were excluded from a part in the State government. As the Anti-Constitutionalists had been identified with the movement to liberalize these laws, the radicals were the better able to conduct a successful campaign in the autumn of 1784.

[34] *Pennsylvania Packet*, Dec. 27, 1784.

Pennsylvania Constitutionalists from the European shore,[35] arrived in Philadelphia again in September, 1785. He was accorded a generous welcome. Among other marks of attention, he was presented with an address from the Constitutional Society. A committee of fifteen members of this organization appeared before him, and in their address they said: "It would be endless to enumerate the great variety of instances in which you have benefited the State of Pennsylvania in former times and of late;—before the late glorious Revolution, and since. We cannot, however, omit to express the high veneration with which we view you as the father of our free and excellent Constitution. In this great work we persuade ourselves that you, in conjunction with the other patriots of the Convention, over which you presided, have erected a stronghold to the sacred cause of liberty, which will long continue as it has hitherto done, to resist the assaults of all its enemies, and if anything of human contrivance could attain to immortality, we would fondly flatter ourselves that it might remain forever." [36] To this little sect of enthusiasts who clung to their doctrines with the faith that belongs to a religion, Franklin made a characteristic response: "Your friendly congratulations on my safe return to our country, are extremely obliging. In the services you are pleased so kindly to remember I had great and able assistance from others. My principal merit, if I may claim any in public affairs, is that of having been always ready and willing to receive and follow good advice. I think myself happy in returning to live under the free Constitution of this Commonwealth, and hope with you that we and our posterity may long enjoy it." [37]

Elections for the Executive Council and Assembly were

[35] Franklin wrote to a friend in Philadelphia under date of March 19, 1780: "The disputes about the Constitution seem to have subsided. It is much admired here and all over Europe, and will draw many families of fortune to settle under it, as soon as there is peace."—*Pennsylvania Packet*, Jan. 27, 1784.

[36] *Pennsylvania Packet*, Sept. 19, 1785.

[37] *Ibid.*, Sept. 19, 1785.

again pending, and the Constitutional Society at once made Dr. Franklin its candidate for the Council, to represent Philadelphia city, to which office he was elected. When the Assembly and Council met to choose a President for the State for the ensuing year, Franklin, as it was planned that he should be,—when he was placed in the Council,—was elevated to this position. The proclamation of his election, we are told, was made at the Court House "amidst a great concourse of people, who expressed their satisfaction by repeated shouts".[38] Both parties united in doing him this honor, and his election appears to have been unanimous, except for his own vote, a circumstance which afforded him much satisfaction, as he mentioned the fact in his correspondence with the Duke de La Rochefoucauld, and with his other friends in France.[39] In the same way he was re-elected to the office in 1786, and in 1787, when, upon completing his third year, he, by the terms of the Constitution, could serve no longer, and retired to private life, being congratulated by his French friends for the fortitude he had shown at his great age, in taking up the reins of government in a turbulent State.[40]

With the establishment of the Federal Constitution, public attention was directed to its form, which followed Adams' English type, and was so far out of sympathy with the principles which were contended for with such zeal in Pennsylvania and France. The conviction deepened in Pennsylvania that Franklin's Constitution must be changed. The Constitutionalists, consistent to the end, opposed the adoption of the Federal Constitution because of its aristocratic character. They were not particularists as were the "States rights" men who opposed the Constitution of the United States, on the ground that the federation would be so much stronger than the individual members which composed it.

[38] *Packet*, Oct. 31, 1785.

[39] Cf. Temple Franklin's Collection, Vol. II, p. 97.

[40] Cf. Letter of the Duke de La Rochefoucauld, Sparks' *Works of Franklin*, Vol. X, p. 247.

They were social theorists who contended that society would suffer; that men would be ground under a weight of complex governmental machinery, and that classes would be formed, undoing all the good which had been gained by a return to Rousseau's state of nature. The Assembly of Pennsylvania, in 1787, had voted to authorize an election for members of a State Convention to ratify the Federal Constitution. About a score of the Pennsylvania Constitutionalists opposed this movement with a pertinacity worthy of some useful cause. They absented themselves from the Assembly, in order to break a quorum, and thus prevent the transaction of public business. They complained that two of their body "were seized by a number of citizens of Philadelphia, who had collected together for that purpose, their lodgings were violently broken open, their clothes torn, and after much abuse and insult they were forcibly dragged through the streets of Philadelphia to the State House, and there detained by force"; that "in the presence of the majority" they were treated with the most insulting language [by the crowd in the gallery] while the house so formed proceeded to finish their resolutions".[41]

These martyrs to the liberal cause now issued an "Address to the People" after the manner of the time, in which they explained how great was their opposition to a Constitution, such as that one was which a State Convention would soon be called together to ratify,—with its two houses, including its aristocratic Senate, the Federal Judiciary and other features so hostile to the spirit of true democracy.[42] Such proceedings, it may be noted, are not very unlike many which were to ensue in France during the period when government was concentrated in a single house of legislature in that country.

The Constitutional party in Pennsylvania, when the Fed-

[41] *Pennsylvania Packet*, Oct. 4, 1787. Cf. *Minutes* of the Eleventh General Assembly of Pennsylvania, p. 244.

[42] *Pennsylvania Packet*, Oct. 4, 1787. Cf. Address of the dissenters in the Convention, *Ibid.*, Dec. 18, 1787.

eral Constitution had been adopted, found itself a small protesting minority, not in one State, but in thirteen,—in a whole nation. The battle had now been won. The English Constitution, fitting in as it did with the traditions, the character, the empirical details of the whole American civilization, had triumphed at last. The Constitution of England, of Montesquieu, of John Adams, of Massachusetts, Virginia, New York and Maryland, and nearly all the American States, had become the Constitution of the nation, and Pennsylvania must now leave her isolated place, and join her sister States, conforming to the general model which Ross and Clymer, and McKean and Wilson, and Dickinson and Muhlenberg, the loyal ten in the Council of Censors of 1784, and many another friend of the Commonwealth had striven for, against such singular and mighty odds.[43]

What remained was but a slight detail,—a resolution of the Assembly, an election of delegates, a convention. On March 26, 1789, by a vote of forty-one to sixteen, resolutions were passed by the Assembly recalling the fact that the people had the inherent right to alter their governments, choosing their own method, wherefore the people of the counties were recommended to elect members to a convention equal to the number of members returned to the Assembly.[44] The Executive Council was now a great inconvenience. With the addition of counties, it had come to have a membership of nineteen. It was spoken of as "an absurdity of the most glaring kind", while its chief object was said to be "to shelter the most active and mischievous characters from that responsibility which they owe to the people, and prevent them from being individually obnoxious to legal punishments

[43] "By this event [the adoption of the Constitution of the United States] the Constitutional party of Pennsylvania was laid at the feet of the Republicans, who, now triumphant under the appellation Federalists, overwhelmed their adversaries with the short-lived odium of Anti-Federalism."—Graydon, *Memoirs*, p. 342.

[44] Cf. *Pennsylvania Packet*, March 23, 1789, for the text of an address to the people, which was introduced in the Assembly, but was not adopted. Also *Ibid.*, March 24, 1789.

for any reprehensible proceedings".[45] The dissentient members of the Assembly, who still clung faithfully to the Constitution, filed the reasons for their opposition to the course of the majority.[46] They alleged again that the legislature was exceeding its authority when it issued a call for a convention, that the Council of Censors would soon meet once more, when a change might be made, if it were adjudged to be necessary, through constitutional channels. This was described as the fourth attempt of the "aristocratic party to betray you into a voluntary surrender of your liberties", by the destruction of "that free and equal Constitution, which an overborne minority in your Assembly is no longer able to preserve".[47] Petitions were again circulated for the signatures of the Constitutionalists, but when the Assembly reconvened in the autumn, a resolution was passed by a vote of thirty-nine to seventeen finally sanctioning the convention, which was called to meet in Philadelphia, November 4, 1789,[48] and this was the Constitution of 1776's last death throe.

Once the convention had met, there was not for a moment a question as to the fate of the single house, the weak and divided executive, the subservient judiciary, and the Council of Censors. They were consigned to the constitutional lumber-room, from which they are not likely soon again to be brought forth.

[45] *Pennsylvania Packet,* March 24, 1789.

[46] *Ibid.,* April 1, 1789. [47] *Ibid.*

[48] The resolution declared, "that having taken effectual measures for satisfying themselves of the sense of the good people of the Commonwealth thereon, they are well assured from the petitions referred to them, from inquiries made, and from information given by the several members, that a large majority of the citizens of this State", etc., desire a convention. The petitions were supplemented by the observations of members of the Assembly, who, during the recess, had "mixed with their constituents", thus having an opportunity to judge well of the state of public sentiment upon this subject. Furthermore, the members in their capacity as the people's representatives, combined with these considerations "a conviction" of their own, independently arrived at "that the measure is in itself right and necessary".

In passing, it is difficult not to stop a moment to ask and wonder whether or not such a struggle for the system of checks and balances, and the division of the executive, legislative and judicial functions of a government really brought with it its true rewards. With the recent development of cabinet government beginning as it did in England, and spreading until it now girdles the globe, we cannot but inquire whether the battle which Adams fought was worth the fighting. It seems clear to us now that we, catching the substance, unformed and plastic, of the English Constitution, as we found it at the end of the eighteenth century, fixed it rigidly in our written instruments of government until we are to-day in a position isolated from all the world. Our President and our Governors, are like King George III, with their personal cabinets. Our legislatures are the legislatures of England a hundred years ago.[49] We with our written constitutions have been standing still, while England has gone forward developing her system of responsible cabinet government, which is the subject of so much admiration wherever British political institutions are understood and appreciated.

It would be difficult though, it seems to me, to overestimate the service which Adams, Hamilton and the fathers of the American constitutional system performed in saving us from unchecked popular rule, by leading the people away from the consequences of such teachings as Rousseau's, and those which the whole French race soon went in pursuit of, headlong to their ruin. The results here could not have been the same, for the conditions were so different. They, however, would have been absolutely blighting, anarchic and bad. We had declared that all men were free and equal, but we did not act fully up to our expressed convictions. The people did not legislate; they still delegated this power to their repre-

[49] Cf. C. Ellis Stevens, *Sources of the Constitution of the United States*, New York, 1894, pp. 148 *et seq.*; Bryce, *American Commonwealth*, 3d Edition, Vol. I, pp. 34 *et seq.*; Lecky, *Democracy and Liberty*, Vol. I, p. 3.

sentatives, who, even in Pennsylvania, were to be "persons most noted for wisdom and virtue".[50]

We did not, except in a few instances, as notably in Pennsylvania, commit our political fortunes to a single body of deputies, as they soon did in France; we retained the English system of checks, balances, vetoes and negatives born not of a belief that all men were equally capable as social and political beings, but of one quite different, that they were unequal indeed, many being capricious, passionate, hasty, irrational, ambitious, egoistic,— masses of men often exhibiting these symptoms after a manner that segregated individuals do not. It was John Adams' glory that he at the beginning of the constitutional contest in America, when the royal and proprietary governments had not yet been overthrown, understood all this, and spoke out in fearless tones against the dangers which lurked in the rule of the multitude. His biographer, Mr. Charles Francis Adams, has justly said: "Nobody has done so much to prove the fatal effect of vesting power in great masses in any single agency. No one has shown so clearly the necessity of enlisting the aid of the various classes of society to the support of a common cause, by giving to each of them a legitimate field of exertion."[51] For the service that it was to us in the early days of our experiments with independent government in America, and for what we still confidently expect of it, we must cherish the system as a very noble inheritance. Not until we are convinced that the evils which have developed in our political life, and which are putting the virtue of our civil institutions to so sore a test, are induced by the system rather than by the inherent shortcomings of men in democracies, should we be willing to turn from the course which history and experience have marked out for us. To inject into our heritage to-day, principles and political forms which trace another lineage, would result no more happily than the French effort at the end of the eighteenth century to discard history, and

[50] Pennsylvania Constitution, sec. 7.

[51] *Works*, Vol. I, p. 435.

lay the foundations of the future on strange lines. Every empirical sentiment, and all the teachings of modern science, combine to bring home to reasoning men this one great fact which will live as long as the world lasts and human government endures.

CHAPTER III

THE RISE OF THE CONSTITUTIONAL CONVENTION AND THE DECLINE OF THE LEGISLATURE

ALTHOUGH an unfriendly newspaper critic had alleged that it was ridiculous for "the thirteen United States of America to maintain an Ambassador in England at the enormous expense of, perhaps, eight or ten guineas per day for no other visible purpose than to write a eulogium on the British government under the sham pretence of vindicating the American Constitutions",[1] Mr. Adams' "Defence" of these Constitutions against the attack of M. Turgot exerted a very great influence when it appeared, well supplementing the work which he, and those who thought with him, had earlier done in behalf of the system of checks and balances in the United States. So well established were these views, however, by the time the Federal Convention met that the advocates of a single chamber were an insignificant force. Madison wrote in the *Federalist* in 1788 respecting a legislature of two houses: "This is a precaution founded on such clear principles and now so well understood in the United States that it would be more than superfluous to enlarge on it."[2]

In other States than Pennsylvania there had also been a tendency toward the simpler forms, and notably in Massachusetts, where John Adams himself drafted the first constitution, it having been adopted by the convention as it came from his pen without material amendment. It has survived to this day in its fundamental form though as the years have rolled along some changes have been dictated by modified conditions and circumstances. Adams' Constitution is still

[1] *Pennsylvania Packet*, October 5, 1787.
[2] *The Federalist*, p. 292.

the Constitution of Massachusetts, though 119 years have passed over its head, a remarkable tribute to the political wisdom of its author which is contrasted in a striking way with the brief and unhappy life of Franklin's *a priori* scheme of government in Pennsylvania. Even Samuel Adams is said to have been inclined toward a single house of legislature in Massachusetts,[3] and later as the people's discontent spread, with the severer financial conditions which were brought on by the war, they, dissatisfied and unable to trace their ills to the true source, made it an occasion to demand a more democratic form of government. For instance, at the convention in Hampshire County that met in 1786, just prior to "Shay's Rebellion", which the State government, as it had been constituted, was fortunately strong enough to cope with in a summary way, it was asserted that the Senate was a most obnoxious feature of the Constitution. Since it seemed to be a restraint upon the insurgents' mischievous designs, they desired that the second house should be abolished.[4] An insurrection in New Hampshire also evidenced much popular dissatisfaction in that State. Changes in the Constitution were desired since the existing government had proven itself strong enough to prevent the realization of the plans of certain agitators for unlimited issues of paper money and a more equal distribution of property.

It was these outbreaks, Adams tells Franklin, which really set him to the task of writing his "Defence of the American Constitutions". The work was suggested, he says, by "the late popular frenzy in Massachusetts and New Hampshire". A government of three departments and a legislature of two houses in order to prevent a régime of disorder under the leadership of a passionate convention without checks of any sort—this is "the only sense", Mr. Adams adds, "in which I am or ever was a republican.[5]" In recalling this period of

[3] John Adams' *Works*, Vol. I, pp. 286-7; also Vol. IX, p. 618.
[4] G. L. Austin, *History of Massachusetts*, Boston, 1876, p. 365.
[5] Sparks' *Works of Franklin*, Vol. X, p. 284—a letter to Franklin from London, dated January 27, 1787.

his life afterward, in 1809, Mr. Adams referred to the anxiety which he felt while his "Defence" was in preparation, lest the dispersion of extreme democratic sentiments in Massachusetts should lead to total anarchy, and wrote: "Every western wind brought us news of town and county meetings in Massachusetts adopting Mr. Turgot's ideas, condemning my Constitution, reprobating the office of governor and the assembly of the senate as expensive, useless and pernicious, and not only proposing to toss them off but rising in rebellion against them. In this situation I was determined to wash my hands of the blood that was about to be shed in France, Europe and America and show to the world that neither my sentiments nor actions should have any share in countenancing or encouraging any such pernicious, destructive and fatal schemes".[6] All over America, indeed, though nowhere to so marked a degree as in Pennsylvania, the friends of extremely democratic forms were a very active force. Thoroughly beaten and discredited as they were by the adoption of the Federal Constitution, and by the lessons which all the world could draw from the dire occurrences of the French Revolution, the same elements continued to exert an influence on American politics for many years.

Convinced as the best minds then were, and as we still must be in looking back over the history of the American States, that their constitutional development was natural and proper only so long as it conformed to those empirical principles which Adams so clearly perceived and so ably defended, there have come up in course lately some things that contrast rather curiously with earlier events. The growth of the influence of the constitutional convention is unquestionably one of the most remarkable manifestations in the field of popular government in the United States to-day. The convention has been gaining strength year by year and has been absorbing powers that it earlier did not possess until the legislature with its boasted two chambers, once the centre of so peculiar a constitutional contest, is to-day little more than a

[6] Adams' *Works*, Vol. IX, pp. 621, *et seq.*

shadow of its former self. One of the three departments of government, the legislative, expressed itself through the legislature which has now had to divide its honors with another legislative agency, the convention. This convention, oddly enough, is an assembly of a single chamber, from which the founders of the government strove so diligently to keep us free. How we have come through this development it will be my task in this chapter to demonstrate.

There has never been the slightest doubt in the minds of publicists who have written of our institutions as to where sovereignty resides. It resides with the people. They are the original source of the government's authority; it is with them as the object of its activities that the state exists. They, somewhat in the way of a great abstraction, serve us as a background for our political thinking, and from them the various agencies of the government are traced out historically into their present forms. Political philosophy devotes itself to exploring the field and defining, in so far as it can do this, the frontiers of government, laying out the boundaries of the "state" in relation to whatever else exists in our social system. Political science, taking these frontiers as they have been established, looks to the problem of organizing the state, of giving to it a definite position in the social scheme, of appointing its agents and assigning to each its suitable tasks. We have noted how at great pains the American governments were held to three main departments, the legislative for enacting the law, the judicial for expounding and interpreting it and the executive for carrying it into effect. The people as the sovereign power had delegated to these agencies, one checking the other, in order to secure stability and equipoise—thus, as it were, putting a spine in the creature that it would not fall with every turn of the wind—the authority to act in their name as the government and the state.

Now, how does the State constitution fit into this system, and in what relation does the convention, which framed it, stand to these other agencies of the government? The

Americans turned to a written constitution in the most natural way, and again chiefly because they were at ground Englishmen, or, at any rate, colonists gone out from the British Islands, carrying with them their grants and charters in which were guaranteed to them the rights they prized so highly. It is true that England herself had not then, and still to-day has not a written constitution. Throughout the colonial period, however, in the struggle with the crown and the proprietors it was, with the American colonists, a question of securing from England fresh concessions, and not any of a chimerical kind but those which were couched in definite terms and which the delegates, who often sought them in person, could bring home with them in writing across the ocean.

It was a development perhaps not quite so natural that these constitutions should be framed by conventions, *i. e.* by bodies of delegates separately chosen to do this important work, rather than that the task be intrusted to the regular legislature which has created and continues to build up the English Constitution. But it is necessary to consider the fact that when the colonies broke loose from their English moorings, the aristocratic assemblies and royal governors could no longer be safely utilized. These were followed by conventions, or provincial conferences, or congresses, however they may have been denominated. As Jameson, in his classic work on *Constitutional Conventions,* clearly points out, these bodies were of the "revolutionary" type exercising powers of various kinds; not only framing new constitutions, but also electing magistrates and members of the general Congress, enacting statute law on a wide variety of topics and providing for the common defense. They got their authorization through force, *i. e.,* lacking other means, the stronger party in the colonies allowed these bodies of delegates to step in and do what was considered to be expedient to establish and perpetuate the principles which this stronger party valued and held to be dear. Some of the first constitutions were framed by the same bodies which

acted regularly as legislatures, as in New Hampshire in the case of the Constitution of 1776, and in Virginia a few months later; and with hardly an exception the bodies which framed the constitutions enacted also a considerable amount of ordinary legislation to serve temporary ends, even when called for the single purpose of devising a form of government with the expectation that they would adjourn and make way for other agents so soon as their special task had been performed.

Although it was early less clear than it has since come to be that a convention should not enact statute or municipal law, the belief was even then well grounded that the legislature should not mix in with the work of making the constitutional and fundamental law of a State. The legislature of Massachusetts in 1778, acting on its own responsibility, had framed a Constitution which was submitted to the town meetings. The people rejected it because they were led to think that it had been prepared in an irregular way, that is, by the legislature rather than by a convention specially chosen for the work. Almost immediately afterward the people of Massachusetts voted to delegate the task to a convention and the Constitution framed by this body met with popular approval. In South Carolina where the Constitutions of 1776 and 1778 were framed by the legislature the Supreme Court declared that "the form of government" was "no more than any other legislative act". The same authority that made it could repeal it again whenever it chose.[7]

In but one or two instances at that early time was the legislature authorized either to make or propose amendments to the constitution after it had been promulgated as the organic law of the State, and then only under severe limitations. In one State, at least, Pennsylvania, where the Assembly was given large and various powers in respect of other matters such authority was in specific terms prohibited to the legislature. The Constitution declared that the legislature should have no right "to add to,

[7] Cf. 2 McCord's R., p. 354.

alter, abolish or infringe any part of this Constitution".[8] By the differentiation of these two functions of statute law-making and constitutional law-making another check, or balance, was introduced into our system, and how separate and distinct have been the careers of the convention for enacting the fundamental law and of the legislature for enacting ordinary legislation is emphasized very strongly by a study of the later history of the development of political institutions in our American States.

Within a comparatively recent time, however, another tendency has manifested itself and our earlier discussions as to the relation which should exist between the convention and the legislature have developed new aspects. Much interesting material is afforded the student in this field of inquiry. It has been asserted by the members of some of the conventions, and they have been upheld in the view by justices of certain State courts, delivering official or unofficial opinions on the subject, that the conventions are over and beyond all law. These bodies are sometimes looked upon as extraordinary agents exercising extraordinary powers, being not a part of the system of State government but the author of it, and therefore independent of any other agent the people may establish. It has been argued that when the convention meets the State is again resolved into its original parts, a notion borrowed of course from France, analogies being drawn between our own and the French constituent assemblies of revolutionary types. When the convention meets, the people, it is said, take back to themselves all the authority they ever delegated, *i. e.* to the State government, but a residuary portion of course since certain enumerated powers have been made over to the Federal government which may be resumed again only by means of a separate Federal process.[9] Such a view, however, must be regarded as wholly

[8] Constitution of 1776, sec. 9.

[9] Cf. Tenth Amendment of the Federal Constitution; Jameson, *Constitutional Conventions*, 4th ed., p. 87; Cooley, *Principles of Constitutional Law*, pp. 29-30.

untenable in the face of the evidence and argument adduced by Judge Jameson.[10] It is the accepted theory to-day, as a result of our development and experience in respect of conventions, that they must co-operate, in a way at least, with the other agencies of government which the sovereign society has established. It is necessary to the regular and orderly working out of our system that the legislature, which has been aptly called "the sentinel on duty",[11] shall put into motion the machinery for the assembling of the convention and shall perhaps also in some measure prescribe the bounds within which it may act. Precedents upon this point are now so numerous that no other view can be allowed and conventions which were assembled on their own authority, responsible to no established organ of the State, would be mere mass meetings, akin only to those of 1776, of the secession and reconstruction periods in this country, and of 1789 and after in France. Such conventions might become a source of very serious danger and, were these unbridled assemblies a part of our scheme of government, the days of the American democracy could be reckoned near their end. The convention, if precedent is followed and good counsel from our history and experience are sought, will never gain such ascendency over the legislature and the other agencies of government as to get entirely free of reasonable restraints.

It is of much theoretical interest to speculate in regard to the instability of our institutions were the convention to gain unwonted power at the expense of the other agencies of government. But it must be of a great deal more actual present importance to us to note how the convention is making head against these rival agencies, and particularly the legislature, from another side where the ramparts are not so high nor so well defended. No tendency among all those which are at work in the domain of government upon this

[10] Von Holst's opinion is divergent; cf. Apendix C of Jameson's work on *Constitutional Conventions;* cf. also Reports of cases before a leading State court, both confirmatory of Jameson,—Wells *v.* Bain, 75 Pa. 39; and Woods' Appeal, 75 Pa. 59. [11] Jameson, *op. cit.*, p. 365.

side of the Atlantic Ocean is more striking and none should claim a larger share of our interest and concern. It is a silent and gradual revolution which is bringing the State legislatures into a condition of relative impotency. By any rightful interpretation of the term a constitution must be considered to be an outline of the principles of government. It is a statement of essential and fundamental facts regarding the organization of the state. Our own Federal Constitution is a type of what a written constitution should be, a charter that clearly defines the greater and more general relations between the sovereign society and the agencies by which its authority is outwardly made manifest. The English Constitution, though unwritten, is no less real. It is perfectly definable. It embraces no rules in respect of the traffic in wines, spirits and beer; provisions in regard to the granting of free passes on railways are foreign to it, as are also rules concerning the legal rate of interest on loanable money, newspaper libel, the duello or the lottery which we so often find to-day in American State Constitutions. The Constitutions of Germany, Switzerland and France are not repositories for legislation regarding comparatively trivial affairs. "By the constitution of a commonwealth," Jameson says, "is meant primarily its make-up as a political organization, that special adjustment of instrumentalities, powers and functions by which its form and operation are determined."[12] Again this high authority says: "A convention is authorized to embody in the constitution general provisions establishing principles, but leaving details dependent on considerations of temporary expediency to be determined by the legislature."[13] For these reasons we find that legislation of this kind is called the "fundamental law" or the "organic law". It has a character of its own inviolable in the minds of all men who are trained to recognize the simplest of legal and political distinctions. How ruthlessly we have leveled these barriers that divide two great classes

[12] Jameson, p. 67.
[13] *Ibid.*, p. 429.

of law it will be my task here now in a general way to indicate.[14]

At first the legislatures were left a very wide field for their activities. To them was given comparative freedom to fill out the skeleton of government, to put in the flesh, and fibre. They indeed exercised very extensive powers which were not legislative in any true sense. They, in many cases, chose the Governors, or Presidents, of the States. They thus exerted an important control over the executive department of the government. Such privileges seem to have been enjoyed by the legislatures of all the States during the Revolutionary period, except Massachusetts and New York. The legislatures chose, not only the Governors, but also the Governors' Councils in a great many States, as well as other State executive and administrative officers, such as the State Treasurer and the Secretary of the Commonwealth. The State legislatures elected the delegates to the Continental Congress. The judges of the higher courts were appointed by the legislature as was the Attorney-General or public prosecutor, and in some cases, as in Delaware,[15] the judges of the county courts were chosen by the same power. The legislature sometimes even selected the members of the second house or Senate, which is to say that the legislature was elected by the people as a single house, and, either resolved itself into two chambers afterward, as was the case, for instance, in South Carolina, or went outside of its own body, as in New Hampshire, selecting the members of a second house from the people of the State at large. To the legislature was sometimes entrusted also the duty of appointing the officers of the State's land and naval forces, as by the first Constitutions of Delaware and New Hampshire. The legislature was in no case subject to an executive veto ex-

[14] In recent years attention has been frequently directed to this development; cf. Bryce, *op. cit.*, Vol. I, pp. 443 *et seq.*; Borgeaud, *op. cit.*, pp. 39 *et seq.*; Lowell, *Governments and Parties in Continental Europe*, 1897, Vol. II, p. 293.

[15] Constitution of 1776, art. xii.

cept in Massachusetts and New York, the Governor applying the negative in the former State, and a Council of Revision, composed of the Governor, the chancellor and the judges of the Supreme Court, in the latter commonwealth.

No long time elapsed, of course, until the people acted directly in the choice of their Governors and Congressmen in all the States of the Union. Councilors came to be officers in the personal cabinets of the Governors, following the example set by the Federal Constitution, or else were elected by the people. The judges became either appointive by the Governors or elective by the people. The appointment of the officers of the State militia was added to the Governor's prerogatives. In short, the various State legislatures were soon shorn of nearly all their powers in the selection of magistrates, becoming simple law-making bodies, which it is their function to be, of two chambers one having a negative upon the other, the Governor possessing a veto upon the action of both.

This was a natural and legitimate development which was certain to ensue so soon as the various governments were fairly organized, and the example of Massachusetts and New York, and above all of the Federal Constitution, was at hand and could be pointed to as embodying a type system for the free States of this continent. Another and a less natural movement to curtail the powers of the legislature was aimed against it in its capacity as a law-making body and was begun by its rival in the law-making field, the constitutional convention. It was through the offices of the convention, of course, that the legislature had been stripped of its authority in the choice of magistrates, but the first great advance made against the legislature in the more recent movement to lop off its powers was the change from annual to biennial sessions. Earlier it was the universal rule in the different States to elect the members of the legislature every year. If this were not the custom respecting both branches, it was so at least with respect to the lower house or more popular branch of the legislative assembly. The legisla-

ture was not only elected each year, but it met annually also, and this system prevailed with no exceptions until we were well along in this century. Among the original States of the Union making this change may be named Delaware which introduced biennial sessions in 1831.[16] Maryland made the change in 1846[17] and Virginia in 1850, returning to annual sessions in 1870, but again abandoning the system in favor of a session every second year in 1876. Now all the forty-five States of the Union have amended their Constitutions in favor of biennial legislative sessions, or in many instances, as in the newer States, have never known any other system, except New York, Massachusetts, New Jersey, Rhode Island, South Carolina and Georgia. The Georgia Convention of 1877[18] provided for meetings of the legislature every second year instead of annually, as had been the rule before, but in 1892 upon the initiation of the legislature, the Constitution was amended and the annual meeting was restored to the political practice of the State.[19] This seems to be the only case in which a real desire has been manifested for a return to the system of annual legislative sessions and the tendency in all parts of the Union has been steadily in the other direction. In those few States in which the legislatures still convene annually, and, notably in New York and New Jersey, there is no concealment of the public distrust for these bodies, while the conviction seems to grow that it would be a very much better arrangement should they meet less frequently. Indeed in one State, Mississippi, by the Constitution of 1890[20] the convention has gone yet a step farther, providing for regular legislative sessions only once in four years. In the interval, however, two years after the adjournment of the regular session, a special session may be called but this may not continue for a longer term than thirty days.

[16] Constitution of 1831, art. ii, sec. 4.
[17] Amendments to the Constitution of 1776, art. xxvi.
[18] Art. ii, sec. 4, paragraph 3, of the Constitution.
[19] Georgia Laws, 1890-91, pp. 55-6. [20] Sec. 36.

Thus we note that in nearly all the States of the Union the convention has reduced by one half the activity and power of the legislature as a law-making agency, and this, despite the fact that our social life to-day is more complex than ever before, the communities more populous, and human requirements correspondingly greater, while political philosophy is all the time extending the field of government and giving organized society a hand in an increasing number of our worldly affairs.

The change from annual to biennial sessions, however, is not by any means the only curtailment of the legislature's powers recently effected through the instrumentality of the constitutional convention. Not only does the convention bind the legislature to a single session in two years, unless, of course, the Governor should convene an extra, or special session, but it fixes a limit to the number of days during which that session shall last. This is a very late development in the constitutional practice of the States, and the result has been attained in several ingenious ways. The simplest method is to place an absolute limit upon the length of the session. For instance, the Constitution of Maryland says:[21] "The General Assembly may continue its session so long as in its judgment the public interest may require for a period not longer than ninety days." Special sessions which may be convened by the Governor are not to continue for a longer time than thirty days. In Montana the limit is set at sixty days,[22] and in Alabama at fifty days.[23] In Florida the regular sessions "may extend to sixty days" while a special session is not to last longer than twenty days.[24] In Indiana a regular session may continue for sixty-one days, while forty days is the limit prescribed for a special session.[25] The limit in Kentucky is sixty days;[26] in North Dakota sixty

[21] Constitution of 1867, art. iii, sec. 15.
[22] Constitution of 1889, art. v, sec. 6.
[23] Constitution of 1875, art. iv, sec. 5.
[24] Constitution of 1885, art. iii, sec. 2.
[25] Constitution of 1851, art. iv, sec. 29.
[26] Constitution of 1891, sec. 42.

days;[27] in South Dakota sixty days;[28] in Washington sixty days;[29] in Wyoming sixty days;[30] in Colorado ninety days,[31] having been increased from forty days in 1884, on the initiation of the legislature.

Sometimes, too, it is left to the legislature itself to determine, by a vote somewhat larger than a majority of its members, whether the session shall last longer than a prescribed number of days. For example, the Constitution of Virginia provides that, "No session of the General Assembly shall continue longer than ninety days without the concurrence of three fifths of the members elected to each house; in which case the session may be extended for a further period not exceeding thirty days."[32] In West Virginia the limit of the life of the session is fixed at forty-five days, unless two-thirds of the members of each house shall vote to extend it.[33] A somewhat similar provision occurs in the Constitution of Arkansas.[34]

Again the conventions have adopted an indirect method of reaching the same end, namely by altogether stopping, or by reducing the salaries of the members of the legislature after they have been in session for a certain time, adjudged to be sufficient for the transaction of their business. The members of these bodies, receiving a payment from the public treasuries, are in some cases given a per diem allowance instead of a definite sum for the session. Thus in Nebraska the members are to have $3 a day each, provided, however, "that they shall not receive pay for more than forty days at any one session".[35] In Idaho the payments continue for sixty days, in Kansas fifty days, Kentucky sixty days, Oregon forty days,

[27] Constitution of 1889, art. ii, sec. 56.
[28] Constitution of 1889, art. iii, sec. 6.
[29] Constitution of 1889, art. ii, sec. 12.
[30] Constitution of 1889, art. iii, sec. 6.
[31] Constitution of 1876, art. v, sec. 6.
[32] Constitution of 1870, art. v, sec. 6.
[33] Constitution of 1872, art. vi, sec. 22.
[34] Constitution of 1874, art. v, sec. 17.
[35] Constitution of 1875, art. ii, sec. 21.

Tennessee seventy-five days. In Texas the payment is at the rate of $5 per day for the first sixty days and $2 per day for the remainder of the session.[36] Here again is another potent influence working to limit the legislature's activity and to keep it within established bounds.

In late years the legislatures, through the means lying nearest to their hand, have occasionally put forth efforts to restore themselves to earlier power by making proposals to amend the constitution which is a privilege that they generally possess. Thus propositions for a return to annual sessions, for an increase of the number of days during which the session may continue, for the increase of the salaries of the members and so on, are submitted to the people who as a rule quite promptly reject them. The legislatures therefore have never succeeded in regaining very much of their lost ground by these heroic attempts to re-instate themselves in public favor.

The conventions, however, go even farther than this in their determined campaign against the legislature. They incorporate in the constitution definite rules governing the action of the legislatures in respect of many different classes of subjects. The members of these bodies are instructed minutely in regard to the performance of their duties as lawmakers. They are told what they may do, and again what they may not do, so that it is a straight and narrow path, in very truth, which they must thread their way along if they wish their laws to enter into the Kingdom, safe from the revision of the judicial department of the government. Among other subjects to which the conventions are turning their attention to-day are the railways, and private corporations generally. Rules defining corporate rights and regulating the conduct of corporations have been introduced into the constitutions in great numbers. These are often very burdensome to capital, though often, again, quite just; the only point to be insisted on in this connection is the one with which we started out, that laws of this kind might more

[36] Constitution of 1876, art. iii, sec. 24.

properly come from a legislature than from a constitutional convention. There may be found, too, in all the newer constitutions, specific directions from the convention regarding the deportment of the legislature in respect of the State's revenues and expenditures. There are rules for the protection of the sinking funds and for guarding the State's credit against those who would loan it or grant it away. There are definite regulations to govern the State in the taxation of property and the appropriation of the public moneys—all these provisions, reflecting the distrust of the conventions for the legislatures, having been framed in the view of putting up walls and outworks to defend the honor of the State from the spoiler, against whose machinations popular government in some of its degenerate forms seems to furnish no guarantee.

In the same way the conventions have sought to guard the financial credit of the local political units and, more particularly in the larger cities, a field in which America's failures in government have been so notable and numerous as to attract the attention of the civilized world. By many different devices the conventions have undertaken to restrain the legislatures in the passage of local government acts which apply to cities, towns, counties and the other local political districts. The legislatures are confined within constantly narrowing bounds in this department of their activity. There has been a distinct tendency at work for many years to strip the legislature of its power to pass so-called special acts in respect of municipalities. If the affairs of cities are made the subject of legislation at all it must be in a general way, which is to say that rules which are established for one community must apply to all, or, at any rate, to all of a "class", the members of which are similar in character and have the same general requirements. The prohibition of special legislation has led, of course, to rather peculiar results in some instances and many, no doubt, which are disadvantageous to the cities so grouped together, since

their needs are often, in the nature of the case, very divergent.

There are many important classes of legislation, other than laws to regulate local government, concerning which the conventions declare that special acts shall not be passed. In California, for instance, according to the present Constitution of the State the subjects regarding which the legislature may not enact special laws are classified under thirty-three different heads.[37] By the new Constitution of Kentucky twenty-nine classes of special legislation are prohibited,[38] and the list tends all the while to grow appreciably longer. These prohibitions extend to such topics of legislation as divorce, the assessment and collection of taxes, judicial procedure, the punishment of crime, the conduct of elections, the settlement of estates of deceased persons, the management of public schools, remission of fines and penalties, regulation of the rate of interest on money, removal of county seats, the granting of special privileges to persons and corporations, the adoption of children, the protection of fish and game, the regulation of labor and trade, etc., etc.

Furthermore a very large number of provisions are to be found in the more recent constitutions respecting what, by any rightful interpretation of the subject, would be considered to be mere rules to govern parliamentary procedure, such as would not be entitled, therefore, to a place outside of a handbook for the guidance of a legislative body. The conventions determine when bills shall be introduced into the legislature. In Nebraska this may be done only during the first forty days of the session;[39] in California only during the first fifty days.[40] There are rules to govern the reading of bills prior to their passage, and provisions requiring that

[37] Constitution of 1879, art. iv, sec. 25.
[38] Constitution of 1891, sec. 59.
[39] Constitution of 1875, art. iii, sec. 4.
[40] Constitution of 1879, art. iv, sec. 2.

the subject of the bill shall be expressed in its title, that no bill shall embrace more than one subject and that money shall not be appropriated during the closing days of any session. Such prohibitions in the newer Constitutions are meant to prevent the common "railroading" and "jamming" methods which the legislatures to-day, to their infinite discredit, sometimes adopt. The convention again in some cases has taken away from the legislature the freedom to determine when a law which it has approved shall come into effect, a future day for its going into force being definitely set by the constitution, as for instance the July 4th following the date of passage.[41]

The conventions, it appears, have also taken unto themselves the duty of regulating the suffrage in great detail, of safeguarding the ballot system and making specifications of many different kinds that should be wholly foreign to a constitution. They have even intervened to the point of guiding the other agents of the government in the exercise of the police power as in respect to the prohibition or restraint of the sale and manufacture of alcoholic beverages, respecting lotteries and "gift enterprises", libels by the press, polygamy, bribery, "lobbying", "log-rolling" and the purchase of men's votes, the duel and the punishment of those who commit offences against good morals. Various state institutions, charitable, educational and penal, receive their grants of power through the convention and the rules for their conduct and maintenance are more or less fully set forth in the constitutions. The salaries of members of the legislature, governors and other magistrates are fixed by the constitutions of the States. The legislature, in short, at every turn must consult the charter from which it derives its powers, if it would steer a course clear of the convention and escape the charge of having passed an unconstitutional act.

[41] Cf. Constitution of Iowa, art. iii, sec. 26; Constitution of North Dakota, art. ii, sec. 67; Constitution of Colorado, art. ii, sec. 19. In this case the legislature usually retains the right to decide whether a given law is of "immediate importance" and if so it may disregard the rule.

As the conventions have undertaken narrowly to define the limits within which the legislatures may officiate, so too have they added details concerning the executive and, more particularly, the judicial departments of the government. Rules which belong in the practice code to govern the conduct of proceedings in the courts and which have no particle of right in constitutional law have crept into these instruments of government to the lasting confusion of our legal systems. But upon the dignity of no other department than the legislature, its own vigorous rival, has the convention made such serious attacks, and for the motives of no other has it expressed so much distrust. Indeed by no other means than a careful perusal and study of these instruments in a comparative way can any person arrive at a correct view of the great variety of topics which to-day are treated by the constitutional conventions in the different American States. This is not better indicated than by the growing length of the constitutions. Beginning we know as brief and condensed statements of the fundamental principles of government, dignified in form, even though they were sometimes the work of political illusionists, they have increased in body and volume several times over. The first Constitution of Virginia with its famous Bill of Rights takes up only four pages in Poore's edition of the Federal and State Constitutions. Virginia's Constitution adopted in 1830 covers seven pages. Its successor framed in 1850 had increased in length so that it needed eighteen pages, while the present Constitution of Virginia fills twenty-one pages in the same book, an increase between 1776 and 1870 from, say, 3000 words to 15000 words. Each of the first two Constitutions of Pennsylvania, adopted in 1776 and 1790, takes up about eight pages in Poore's large quarto volumes. The present Constitution of the State adopted in 1873 occupies twenty-three pages. Missouri's Constitution was twelve pages long in 1820, increasing to twenty-one pages in 1865 and thirty-three pages in 1875. Illinois shows a striking advancement from ten pages in 1818 to twenty-one in 1848

and twenty-five in 1870. All the newer Constitutions are of great length. Fair types of those most recently adopted are Montana's in 1889, Washington's in 1889, Mississippi's in 1890, Kentucky's in 1891, each one of which contains upwards of 20000 words. The Constitution of South Dakota of 1889 comprises 25000 words, while the Constitution of Louisiana adopted in 1898 embraces no less than 43000 words codified in 326 separate "articles"! The first Constitution of Louisiana, dated 1812, contained between 5000 and 6000 words, swelling to 10000 in 1845 and 1852 and 12000 in 1868. The first Constitution of New Hampshire in 1776 contained only about 600 words and some of the State Constitutions framed during the Revolutionary time contrast with those which are being framed to-day, even for the new and sparsely populated commonwealths of the "Far West", in a most striking way.

To this curious and somewhat humiliating position has the constitutional convention brought the American State legislature, possessing not the sovereign power of the Federal Congress in greater matters, of course, but originally exercising a very large share of residuary authority in the district under its own jurisdiction;—the legitimate successor of the same Parliament which gradually won its freedom from the king and the king's high judges, which fought for its life against those who would prorogue it and dissolve it contrary to its will, which was the one place where the people were given a voice and an opportunity to impress their views upon the public polity, and which when the States declared their independence of England became almost the sole heir, as we have seen, to the whole governmental estate. The legislature in those States in which good patterns were followed, Pennsylvania being the most notable exception to the rule, was effectively curbed in some directions by the executive and judicial departments of the government, but in its own field as a law maker it was practically supreme. It has been reserved to a fourth agency of government, the convention, to dispute its title to its own birthright.

But is there not perhaps a method by which the legislature or the other established agencies of government can treat with the convention, giving back to the legislature the old place which belongs to it in the enactment of statute law, while the convention is confined within its proper bounds as a maker of constitutional law? Judge Jameson, our highest authority on the constitutional convention, suggests a simple plan by which to restore the legislature to its own portion. Recognizing the distinction between constitutional law and that which, rightfully considered, must be held to belong outside of these limits, he is led to some very interesting conclusions. "A convention", he says, "is competent to recommend the adoption of principles in such a form and under such conditions as are consonant with the general conception of fundamental legislation and no further. It may indicate what has become the settled policy of the State but if it go beyond that, developing principles into minute provisions, likely as circumstances shift to need modification, it trespasses upon the domain of the legislature. Doubtless a constitution stuffed with legislative details may acquire legitimacy by its being ratified by the people, for where a constitution contains a positive provision the courts cannot ignore it or annul it, but the impropriety of such legislation would not thereby be disproved or lessened. If legislative provisions are thrust into a constitution and passed upon by the people, ought they to have the force of laws any more than when submitted to the people disconnected with provisions truly fundamental? In the latter case we have seen that our courts pronounce them wholly without validity as laws. If the same judgment be not given respecting a constitutional provision consisting of legislative details, it is simply because it would be in effect to permit our judiciary to annul the charters under which they act on the pretext of striking from them provisions not properly fundamental".[42]

We of course cannot conceive of the courts going to the extreme length which Judge Jameson suggests. They are

[42] Jameson, *op. cit.*, pp. 429-30.

employed at every session in defining the frontiers between constitutional and statutory provisions in respect of subjects of very many different kinds. Laws passed by the legislature are declared "unconstitutional" often upon mere technical points. However, as for the judiciary passing such a judgment upon a constitutional provision, no matter how much it might trench on powers which are legislative beyond any one's ability to question it, it is wholly inconceivable. The judiciary, as the recorded cases clearly show, is not without authority over the convention. There is a body of precedent and unwritten law on the point to govern the constitutional convention, but so long as it keeps up the disguise, incorporates its acts in a code and calls it all the Constitution of Illinois, of Pennsylvania, or of Louisiana and no other irregularity is at hand, the courts are clearly not empowered to go behind the presentment and declare that what comes to them as "constitutional law" is really not this at all, but something of an entirely different character.

The judicial department being without authority in the case, it is proper now to inquire if the legislature itself can place any practical restraints upon the convention. Jameson has made a special effort to show how, to a degree, the convention is not a free agent, and theoretically the case is well worked out; but what does the legislature's power really amount to? Could it by any possible method, if it were so disposed, defend itself against the encroachments of the convention? It appears to be well recognized both in theory and usage that it is a power resting with the legislature to call the members of the convention together. The convention is an extraordinary body, meeting infrequently and at irregular times. The legislature may pass a law saying when the convention shall meet, albeit usually only after the question has been referred to the people. It is the authority which by custom and right decides how the convention shall be composed, of how many members, etc., the precise day upon which it shall assemble, the place at which it shall assemble. It has the power to provide that the constitution which is framed shall

be submitted to the people for their approval or rejection, and to prescribe an oath for the members of the convention. Can it, however, require that the convention shall do certain things, or perhaps refrain from doing certain other things, changing the constitution only along the lines which the legislature itself lays down? Considerable precedent exists which would seem to indicate that the legislature can bind the convention, at any rate up to a certain point, and there would appear to be only three cases in which conventions have undertaken to disobey the mandates of the authority that brought them into life.[43] The course adopted by these conventions yielded them no gain and led in one instance, in Pennsylvania in 1873, to judicial opinions of a very noteworthy character.

There are, however, relatively few cases in which the legislature has attempted to bring its own strength to a full test. It would be difficult, no doubt, to hold a convention in check with the precedents at hand if the restrictions weighed very heavily upon it, though an oath prescribed by the legislature, requiring the members of the convention to act strictly in a line with the provisions of the law by which the body was called together, has been successfully employed. As full of theoretical interest as this subject may be, it is perhaps not likely that the legislature will make very much progress in retaliation by this method so long as the constitutional codes are submitted to the people and have the added force of the endorsement of a body from which all the agents of government derive their just powers.[44] A most interesting and a very recent case in point is afforded by Louisiana. In 1896 the legislature of that State passed an act submitting to the people the question as to whether or not a convention should be called to revise the Constitution. If the proposition were approved, as it was approved, by popular vote, the convention was to meet in 1898, but it was to be subject to seven separate and important limitations. The convention was prohibited—

[43] Cf. Jameson, *op. cit.*, p. 375.

[44] For a full review of this subject see Jameson, pp. 362 *et seq.*

(1) From impairing "the bonded indebtedness of the State or of any parochial, municipal, levee or other political corporation" without first securing the consent of the holders of the securities representing this debt.

(2) From increasing the rate of taxation above the limits set in the old Constitution for any other purpose than to extend local assistance to public schools, and to aid in executing public improvements, and then only with the approval of the property taxpayers affected by such increase.

(3) From changing the levee system as it was then organized under the terms of the old Constitution and of statutory provisions enacted in pursuance thereof.

(4) From reducing or shortening the terms of office of the members of the legislature or of State or local officers, whether elected or appointed, or from reducing their respective salaries prior to April, 1900.

(5) From making the offices of the chief justice, or the associate justices, of the Supreme Court of the State elective, and from shortening the term of office or reducing the salaries of the incumbents.

(6) From legalizing lotteries.

(7) From removing the capital of the State from its present site at Baton Rouge.

The legislature in order to make its position secure required, furthermore, that each delegate to the Convention before he should be qualified to act as a member of the body should take the following oath before the chief justice or presiding associate justice of the Supreme Court: "I hereby solemnly swear that I will well and faithfully perform all my duties as a member of this Convention and that I will observe and obey the limitations of authority contained in the act under which this Convention is assembled." By such a method the Louisiana Convention was bound beyond all power to loose itself, and the act is entitled to rank as one of the most important counter-movements against the convention's usurpations which any legislature has ever organized and led.[45]

[45] Acts of Louisiana, 1896, pp. 85-87.

The legislature of Rhode Island lately employed still another plan, bold in conception, though as it has developed quite barren of result. Instead of calling a new convention to revise the Constitution, the legislature passed a resolution in 1897,[46] in response to what was described as "a widespread feeling among the people of the State that the Constitution should be carefully and thoroughly revised". The legislature thereupon authorized the governor to appoint a commission of fifteen persons whose duty it should be to report to the General Assembly. The revised Constitution was then to be treated as if it were a separate and single amendment, and adopted by the method prescribed in the old Constitution. It must be approved by a majority of the members of two successive legislatures and be assented to later on in a referendum by three-fifths of the electors of the State, present and voting on the proposition in the town meetings. The legislature by this means retained its full authority over the subject. The commission was appointed. It met and framed the "Amendment" which was an entire new Constitution including a "Bill of Rights". The "Amendment" was then submitted to the legislature which received the commission's report as if it had been the report of one of its regular legislative committees, though no very material alterations seem to have been made in the draft, and it was passed by the General Assembly first in March, 1898,[47] and again in June, 1898.[48] In November of that year it was submitted to the people of the various towns and cities, but it failed to receive the necessary three-fifths vote. The method of framing the Constitution by a commission instead of by a convention was regarded by many persons as very irregular. The total vote upon the subject throughout the State was only about 31,000 (17,589 for and 13,483 against), the vote of the State in the presidential election in 1896 having been nearly 55,000.[49]

[46] Laws of Rhode Island, January session, 1897, p. 121.

[47] Laws of the January session, 1898, pp. 133-54.

[48] Laws of the May session, 1898, pp. 12-34.

[49] Such a result led the Providence *Journal* to remark: "The thousands who went to the polls but failed to vote either for or against the

The method of amending constitutions, or indeed of adopting entirely new instruments of government through the aid of commissions, by which means the legislatures manage to keep this power in their own hands without resort to a convention, has had other applications from time to time in this country, as in New York in 1872, Michigan in 1873, Maine in 1875 and New Jersey in 1881. All these attempts to alter the American practice by subterfuge, however, have proved more or less abortive.[50]

One point more is deserving of mention before we pass from the discussion of this phase of the subject. As the constitutions increase in bulk and are swelled out with the details of legislation, ceasing to be the guides to those who are to make the law and becoming the law itself, they are little better qualified to have a permanency and to claim thorough consideration and respect than is the work of the legislature. If the constitution expresses the changeful whims of society and supersedes the legislature, in a certain measure, in respect of many different classes of subjects, we must expect those very results which have lately been realized, *i. e.*, an increasing number of conventions and frequent revisions of the "organic law". This development has gone forward despite an earlier belief that the tendency would be in a contrary direction. In opposing a provision which should define a method of calling together a future convention, Daniel Webster in the Massachusetts Convention of 1820 said, that "with the experience which we had had of the Constitution there was little probability that after the amendments which should now be adopted there would be any occasion for great changes. No revision of its general principles would be necessary and the alterations which should be called for by a change of circumstances would be limited and specific".[51] Judge Jameson adds upon this point: "Doubtless as our Constitutions become riper and more perfect [!] with time and experience

Constitution should now study public questions enough to have some convictions upon them."

[50] Cf. Jameson, *op. cit.*, pp. 570 *et seq.*

[51] *Debates* of the Massachusetts Convention, 1821, p. 413.

the necessity of employing the more expensive mode [of amendment] by conventions will be found to be less and less ".[52] These predictions to-day seem a long way from realization. We know now that they were false prophecies in every sense.

As society moves backward and forward and the needs of the people change, their laws, too, must change, and even if these are incorporated in codes more or less secure from the hand of the repealer they will not be guaranteed the life of a constitution which is only an outline for the organization and conduct of a government. Another convention will soon need to be called or other steps must be taken to revise or amend it.[53]

The States are now calling conventions at much more frequent intervals than was the case at a former time. Although we still have Massachusetts as a notable instance of a commonwealth walking in the old ways, resisting these modernizing influences in favor of greater power to the convention and therefore a shorter life to the constitution, there are few others like her in the Union of States. Pennsylvania has already had four Constitutions, Virginia four. Illinois has had three Constitutions since the State entered the Union in 1820, Texas three, since the annexation in 1845, Missouri three, including the first Constitution in 1820, Georgia six. Louisiana, beginning with 1812 and ending with 1898, has had seven Constitutions; Mississippi has had four since the State's history began in 1817. When there are no unusual influences at work, as those which unfortunately prevailed in the South during the Secession period, a constitution seems to be good for about twenty or thirty years which is a maximum of life even when the legislature exerts itself at almost every session to prepare amendments and thus alter the constitution upon its own initiative without calling a convention, a process of which more is to be said in another

[52] *Op. cit.*, p. 552.

[53] Cf. Lowell, *Governments and Parties in Continental Europe*, Vol. II, p. 293.

chapter. Nothing could be more natural than frequent conventions with new constitutions every few years when the framers undertake to make them the repositories of large classes of private and administrative law. Since and including the year 1890 the constitutional law of this country has been enriched by conventions in seven States: Mississippi, Kentucky, South Carolina, Delaware, Louisiana, Utah (a new State) and New York (in the latter State the convention amending the old, instead of adopting an entirely new constitution).

We have therefore advanced to that point when we take not only our constitutional law, but much also of our ordinary law, in the States from assemblies of a single chamber. They are on this account liable to every objection which can be urged against single legislative assemblies of any other kind.[54] Certainly there can be no doubt as to the general view which it seems proper for us to entertain regarding such bodies, and yet the situation in practice has come to be so extraordinary that the friends of good government in this country feel constrained to defend the convention in the face of all its usurpations. This is chiefly because of the higher standards that we, up to this time, have been able to secure in respect of the membership of these assemblies. The legislatures of the States are filled with men who, with the rarest exceptions, are of mediocre ability. It is fortunate, if they are not actually dishonest and corrupt. They have been tried and have been found wanting. In those States where they still retain a full quota of power, holding annual sessions and enacting each year a thick volume filled with special and private acts, undigested, confusing and contradictory, often one week repealing in whole or in part a measure which had been passed the week before, there can be no respect and little toleration manifested for the legislators. They were deprived of their power be-

[54] Jameson, *op. cit.*, p. 357. "It [the convention] is liable to the objection so fatal to single legislative assemblies that it is prone to hasty and passionate determinations and is therefore a ready instrument of faction and revolution." Cf. *ibid.*, p. 415; also Lecky, *Democracy and Liberty*, Vol. I, pp. 363-64.

cause they were not careful about the exercise of it. If they use their office as an opportunity not only to display their ignorance, but also to indulge their immoral lust for personal gain, making the legislature an agency for the dishonest disbursement of public funds, for blackmail, log-rolling, trading, dickering, " jamming " and the other operations which are the disgraceful outgrowths of our political system in the various States, we are certainly justified in grasping at almost any new agency that promises us a hope of betterment. If democracy by natural process could not purge itself of such abominations then some other means had to be found to gain this necessary end.

The conventions, chosen more rarely and for a rather unusual purpose, have up to this time been kept comparatively free from those who are " party men " in the bad sense, politicians who are seeking personal profit. Such men wish for the most part to escape the labor which is supposed to attend the framing of a constitution. Should they be elected to membership in the body it would be a fleeting " honor ". Another convention might not meet for twenty years. An older idea, therefore, that our public men should have superior qualifications, that they should be chosen as some of our earlier constitutional writers expressed the thought from among " the wisest and best ", still prevails when members of a constitutional convention are to be elected. Our ablest lawyers seem not to be averse to accepting membership in the conventions, and those who are usually not called upon to serve the State in any other capacity are not uncommonly selected to perform this important public task. Upon the subject of the contrasts in the personnel of the two assemblies, an average legislature and a convention, Judge Jameson expresses a truth which no one acquainted with the facts will dispute, when he says: " If a man shows himself by culture and the breadth of his views to be fitted for the highest trusts it is nearly certain that he will not be found in the legislature, but be left in obscurity at home. But when a convention is called it is sometimes possible to secure the re-

turn of such men. It is not necessarily because such a body is recognized to be, as it is, the most important ever assembled in a State, but because the measures it is expected to mature bear less directly on the interests of parties or of individuals. Party management, therefore, is not usually so much directed to the seeking of control of a convention as of a legislature ".[55] The same facts have been observed and remarked upon by Mr. Bryce,[56] and no better evidence of the difference in personal standards prevailing in respect of the two kinds of bodies is afforded than in the case of the great State of New York. For its Constitutional Convention of 1894 there were secured the services of men who would not have been found in the legislature,—if they had themselves desired seats in that body they could not have got elected. The influence of members drawn from this superior class in the State was of course reflected in the proceedings and debates of the assembly which left behind it a record for honesty and zeal for the public welfare in singular contrast with that of any recent session of the State legislature.

[55] Jameson, *op cit.*, p. 561.

[56] *Op. cit.*, Vol. I, p. 475; cf. Godkin, *Unforeseen Tendencies of Democracy*, pp. 141 *et seq.*

CHAPTER IV

THE REFERENDUM ON ENTIRE CONSTITUTIONS

A CONSIDERATION of all the facts in regard to the constitutional convention in this country, and the relations which in the later years of our political history have been established between it and the legislature, brings us to certain definite results. There is incontestably a tendency in the direction of an enlargement of the powers of the convention,—in the direction of a long constitution containing minute details with respect to subjects which, rightly viewed, do not belong within the sphere of constitutional law at all. These long constitutions, framed to meet temporary conditions, giving expression to passing ideas upon specific matters in specific terms, in the nature of the case, must be more flexible. They must be frequently changed and amended. The average lifetime of a constitution seems to be little more than twenty years when a new convention meets and another long code is adopted. Thus, in spite of ourselves, we have handed over to a single house of legislature very extensive law making powers, putting greater faith in one assembly because its members, as a rule, are men of superior talent, knowledge and moral character, than in two houses and a Governor, who used to be our law-givers over a wider field and of whose ability and honor in the public service democracy has seemed to provide us with no practical guaranty.

Upon this single house there is but one important check and that is applied by the people themselves, *i. e.*, by the electors, coincident in number in most of the States with all the male citizens, without regard to race or color, who are above a certain prescribed age and possess various qualifications as to residence, etc., and in an occasional State as to education. In

a few States, the number of which would seem to be increasing, the electoral body has even come to include women who are admitted to the suffrage on the same liberal terms as men. They, the whole body of electors in the State, as a kind of second chamber are to pass upon such legislation as the convention prepares and submits to them. They may accept it or reject it as they please. It is only by a consideration of the true character of the State constitutions, stuffed out as they are with ordinary statute law, that one can form any proper estimate of the value and importance of the privilege which the people now enjoy.

In recent years attention has often been directed to the custom that prevails in Switzerland of submitting laws to popular vote. We are recommended to introduce the system in this country and the referendum, as it is called (through measures having been passed a long time ago in Switzerland *ad referendum,* as treaties are sometimes passed and contracts are not infrequently made, *i. e.,* subject to the approval of the principals in the transaction) has many friends among us. In Switzerland the people as a whole were regarded as the principals, the members of the legislature being merely their delegates, and the law which the latter proposed, to be valid, had to be ratified by popular vote. The fact is, or, up to a recent time, was, commonly overlooked that the referendum is no strange feature in our system. It comes down to us as a result of a development extending through a very great many years.

In respect of constitutions the referendum made its appearance in America in a very natural way. No one seems to have stopped to discuss the reasons for it. It appears to have occurred to no one of all our leading democrats of the Revolutionary period, not even Franklin or Paine or any of the rest of the ostentatious friends of the people in Pennsylvania, that a constitution to be valid would needs be submitted to popular vote. There were some demands of course that a referendum should be taken in that State, the Anti-Constitutionalists, while the long contest with their opponents was in progress,

having repeatedly urged that, since the people had not approved the Constitution of 1776, its promulgation as the organic law of Pennsylvania was an irregular, if not an illegal act. But as Judge Jameson somewhere observes in explanation of the fact that so few of the early constitutions in this country were submitted to popular vote, there was need of speedy action in nearly all the States since the Tories were active everywhere; and Pennsylvania is an instance in point, for the first Constitution of that State was adopted amid very great political excitement. Delay would have been held to be dangerous and even fatal to the future of the Commonwealth and the entire American cause.

Immediately after the Constitution had been adopted, at the meeting of protest in the State House yard in Philadelphia, October 21, 1776,[1] it was asserted that the right of the people to be consulted concerning the form of government under which they were to live had been violated. Although a few copies of the Constitution had been printed, time was not allowed for them to circulate. The people had not considered the subject and had not made their wishes known to the members of the Convention. The "Right of Petition" had been freely used during the colonial period, and it was employed by both parties so soon as the Pennsylvania State government was organized. The step, then, from the petition, the memorial, and the remonstrance, was not far to the referendum itself.

The Supreme Executive Council in 1777 had recommended that "the sense of the majority of the electors throughout the counties" should be taken on the question of calling a new convention. The Assembly authorized the vote, but serious military operations intervened and it was not until November, 1778, that it could again set a date for the election. Every effort was then put forth by the Constitutionalists to bring it to the point of rescinding its action, which it did as a result of the representations made to the members by petition and otherwise in February, 1779. "Those states

[1] Cf. Resolutions in *Pennsylvania Gazette*, Oct. 23, 1776.

only can be denominated free which are governed under a constitution to which the citizens have given their consent", the Republican Society declared in their Address to the people in 1779.[2] Another writer who took a part in the constitutional discussions in Pennsylvania at this time said that "this great matter must come to the voice of the people before Pennsylvania can enjoy any degree of domestic happiness".[3] And once more in 1789, when the vote still had not been taken, though the constitutional struggle within the State was near its end, certain memorialists declared "that the power of altering the Constitution resides wholly in the people and that they have a right to exercise that power in any way and at any time they may judge proper".

It had been asserted on July 4, 1776, by the framers of the Declaration of Independence that governments derived "their just powers from the consent of the governed", that when certain popular rights were infringed upon it was "the right of the people to alter or abolish" their form of government and to institute another in its stead. There were few, however, who went so far as to say that the people themselves, voting yea or nay, should determine whether one constitution should be adopted or another. The influence of the people as it would be exerted through their deputies and representatives was expected to answer every need. The Anti-Constitutionalists in Pennsylvania, like the plebiscitary leaders to-day in France, were the advocates of a referendum as a means of attaining their end,—the overthrow of the government. The opposite party, doubtless, would have been quite as eager for a direct vote of the people on this subject if the proceeding had promised them any gain. When the Constitution was finally to be superseded in 1789-90 the Assembly, fortunately, was strong enough in itself to issue a definitive call for a convention without referring the subject to the people, and the convention having met and established the form of government agreeable to the views of a majority of its

[2] *Pennsylvania Packet*, March 25, 1779.
[3] *Ibid.*, February 13, 1779.

members, it in turn was glad to be free of any obligation to pass the thing back to the people again.

It is Massachusetts that affords the first example of the actual application of the referendum in this country in the case of a State constitution. In 1776 the Assembly in Massachusetts took steps preliminary to the establishment of a new form of government, though it was not until May 5, 1777, that a resolution was passed recommending it to the people at the next election for members of the Assembly or General Court "to make choice of men in whose integrity and ability they can place the greatest confidence, and, in addition to the common and ordinary powers of representation, instruct them with full powers in one body with the Council to form such a constitution of government as they shall judge best calculated to promote the happiness of this State". It was specified in the same resolution that when the constitution had been framed copies of it should be printed and presented to the people of the towns, who should vote upon it. If it were accepted by two-thirds of those present and voting in the meetings on the subject it was to become the valid constitution of the State.[4]

The General Court or legislature, in this manner chosen, adopted a constitution, as it was planned that it should do, on February 28, 1778, and it was submitted to the people later in the year, though for the reason that it was framed by the Assembly rather than by a convention which had been specially elected by the people for this particular task, because it lacked a Bill of Rights and on other accounts, it was rejected by a large majority—five to one of the votes cast being against it, while many of the towns it seems made no returns

[4] *Journal* of the Convention which framed the Massachusetts Constitution of 1780, Boston, 1832, p. 255. The text of the Constitution of 1778 is contained in the above volume. It will be found valuable for comparison with the instrument which was finally adopted. Cf. *Journal* of Debates and Proceedings in the Convention of Delegates chosen to revise the Constitution of Massachusetts begun and holden at Boston, November 15, 1820. See "Note" on the Origin and History of the Constitution; Hale's New Edition, Boston, 1853.

at all.[5] On February 19, 1779, the Assembly returned to the subject. A "resolve" was passed, this time for taking the sense of the people regarding the expediency of calling a convention to propose a new constitution. The members of the legislature declared that they were unable to determine "from the representations made to this Court what are the sentiments of the major part of the good people of this State", since the earlier Constitution had been disapproved of, and therefore asked the inhabitants to make known their views on the point.[6]

The vote having been taken and "a large majority of the inhabitants" of the towns making returns—more than two-thirds of the whole number—having approved of a new government and being "of opinion that the same ought to be formed by a convention of delegates who should be specially authorized to meet for this purpose",[7] the Assembly thereupon resolved (June 17, 1779) to recommend the people to require their delegates, when the constitution was framed and before it should be adopted, to submit the work of the convention to popular vote. It was provided that copies of the constitution should be laid before "the respective towns and plantations at a regular meeting of the male inhabitants thereof, being free and twenty-one years of age, to be called for that purpose, in order to its being duly considered and approved or disapproved by said towns and plantations". And the resolution further recommended the several towns within the State, "to instruct their respective representatives to establish the said form of a constitution as the constitution and form of government of the State of Massachusetts Bay, if upon a fair examination it shall appear, that it is approved of by at least two-thirds of those who are free and twenty-one years of age, belonging to this State and present in the several meetings".

[5] "Note" on Origin and History of the Constitution, *loc. cit.* Cf. *Life and Works of John Adams*, Vol. IV, pp. 213 *et seq.*

[6] *Journal* of the Convention of 1779-80, p. 189.

[7] *Ibid.*, p. 5.

This was the Constitution which was framed by John Adams, and which is still to-day in all its essential parts the organic law of the State of Massachusetts. It was referred to the people in their town meetings in the manner contemplated by the legislature,[8] whereupon the Convention took a recess charging a committee of its members to print the Constitution and to distribute the "books" throughout the State by means of "three expresses" employed at the public expense. The Constitution having been approved by two-thirds of those assembled in the town meetings and voting upon this subject, it became the law of the Commonwealth.

There were here, it is interesting to note, the two referenda, one following the other: First, a vote to determine whether the convention should be called or not; and second, when it had been called and its work had been finished, a vote to decide if the constitution were acceptable to the people, the identical process with which we have now become familiar in nearly all the American States.

New Hampshire, a State which has always drawn very liberally upon the experience of Massachusetts in the field of public as well as private law, likewise furnishes an early instance of the use of the referendum on a constitution. The first constitution adopted in any of the American States after the separation from England is the New Hampshire Constitution of 1775-76, which was framed and promulgated by a convention, or "Congress", that met at Exeter, December 2, 1775, and completed its labors in the following January. This Congress, as it was authorized to do, assumed to itself the "name, power and authority of a house of representatives or assembly for the Colony of New Hampshire".[9] The Constitution, which is very brief, provided for a second branch of legislature or Council, but neglected to arrange for a Governor, or indeed any officer or officers charged specifically with the task of executing the laws and directing the government. A "Committee of Safety", a kind of executive board,

[8] *Journal* of the Convention, p. 168.
[9] Cf. Constitution of 1776.

was organized, and to it the executive powers were entrusted during intervals when the legislature was not sitting. It was, however, a source of much dissatisfaction, though it was probably as useful a feature of the government as the practically headless board which was created by Franklin and his colleagues in Pennsylvania in the same year. On this and other grounds the people of New Hampshire were urged to change this provisional Constitution which had been framed at the outbreak of the war merely to meet a temporary need.[10] A convention of delegates which had been chosen for the special purpose of preparing a draft of a new constitution for the State, met in 1778, completing its work in a few months. The outline of government which had been framed by the Congress at Exeter was not submitted to the people, but the constitution which it was proposed should supersede it was "dispersed throughout the State", and the officers in the towns were asked to "warn" the inhabitants to assemble to consider the new plan of government. In the town meetings, however, the constitution was rejected,[11] and steps were at once taken to bring together another convention, though this body did not assemble until 1781. The constitution which it prepared was also referred to the people, but it proved to be no more to the public taste than the last one had been, though an opportunity was extended to the towns to propose such amendments as it was thought might make it acceptable to the inhabitants. These amendments were so numerous that the convention, when it resumed its sessions, did not succeed in conciliating the various interests until late in 1783, in which year the constitution being again submitted to the people was approved by them and the new government was inaugurated in June, 1784.[12]

These two States, Massachusetts and New Hampshire, were the only States, among those framing constitutions

[10] Collections of the New Hampshire Historical Society, Vol. IV, p. 162; cf. Belknap, *History of New Hampshire*, Boston, 1791, p. 401.

[11] *Ibid.*, p. 154.

[12] Cf. Belknap, *op. cit.*, p. 435.

during the Revolutionary period, whose conventions referred their completed instruments of government to popular vote; and Massachusetts seems to stand alone in respect of the separate convention referendum, *i. e.*, the preliminary vote to decide whether the convention should be called or not. The Constitution of Virginia had early declared that "when any government shall be found inadequate or contrary to these purposes [the purposes for which government is instituted, enumerated in the Bill of Rights] a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal".[13] This declaration was repeated in the Constitution of Pennsylvania.[14] The Maryland Convention of 1776 announced that "whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old or establish a new government".[15] But the conventions in these States in no instance referred the constitutions to a direct vote of the people. The constitutions were framed and were sometimes formally "ratified" by the delegates in the name of, and by the authority of the people, as the phrase might be, but it was only in these two New England States, where the inhabitants in their local communities had long been accustomed to direct legislation that the referendum made its appearance as a part of our constitutional practice.[16]

[13] Constitution of Virginia of 1776, Bill of Rights, sec. 3.

[14] Constitution of Pennsylvania of 1776, sec. 3.

[15] Constitution of Maryland of 1776, sec. iv.

[16] John Adams contemplated the plebiscite when he wrote in his Autobiography that many questions were referred to him in 1775 and 1776 regarding the proper form of government for a state. "How can the people institute governments?" Mr. Adams was asked. "By conventions of representatives freely, fairly and proportionately chosen," he answered. "When the convention has fabricated a government, or a constitution rather, how do we know that the people will submit to it?" he was asked again. "If there is any doubt of that the convention may send out their project of a constitution to the people in their several towns, counties or districts and the people may make the acceptance of it their own act."

It was in New England that this development might have been expected to begin, since the system of local government there was such as to give great encouragement to the spread of the plebiscital principle. There was in the Puritan Colonies which were established on the shores of New England a return, in fact, to Rousseau's state of nature, where peasants met under a forest tree and deliberated on their own affairs, free from the governmental complications to which a perverted civilization had reduced mankind. A great deal has been said and written regarding certain interesting assemblies of the people surviving still in Switzerland, the old Teutonic folk-mote and other devices by which men of simple needs have cared for their common affairs. It has been assumed that it is a kind of Teutonic heritage. However absorbing such a study may be, there is little enough connection, as it seems to me, between the New England town-meeting and any of the other popular assemblies of history. That one has existed is certainly no explanation for the existence of the other. It appears to be the most natural thing for men when they are set out alone, if they have already reached a certain stage of civilization and are dependent upon their own exertions for survival, to co-operate in order to gain necessary ends. The first stage in co-operation, if they are left to themselves to work out a scheme of government, is for them to meet together in assemblies of some kind where they may propose, discuss and vote. This was the precise course of development in the New England colonies the various proprietors of lands in a given territorial district grouping themselves together that they might mutually protect and advance their own interests. The town indeed was "a body of stockholders assembled in corporate form",[17] and powers were gradually and naturally acquired in reference to the roads and highways, the support of the poor, the choice of local executive officers and such other matters as were of common importance to the members of the group. The "stockholders" met together

[17] C. F. Adams, *Three Episodes of Massachusetts History*, Vol. II, p. 817.

at intervals to determine what their policy should be regarding these public, if somewhat local and trivial questions, and as the settlements became more populous, as the holdings in land were reduced in size, and villages, even cities, resulted, the town meeting was retained as a feature of the local political system. So large a city as Boston clung to this primary assembly of the freemen until 1822, when it was finally necessary to introduce a representative legislature. This characteristic form of local government, which for various reasons did not secure a foothold in the more southern colonies, though it has since travelled westward through the northern zone of States with the New England settlers,[18] is a factor that every one who desires to make a correct estimate of our early institutional tendencies must keep well in mind.[19]

The towns, at length, having been joined together, the affairs of the larger districts, the colonies, were to be cared for and administered. In the colonies of Massachusetts and Plymouth all the freemen at first had a personal voice in the transaction of the public business,[20] but this system soon became inconvenient, and later impossible, so that deputies had to be chosen by the towns. These deputies or delegates went up to the capital carrying with them the people's proxies, *i. e.*, the identical ballot which each freeman had cast in the town or other local district was cast for him by the deputy in the General Court or Assembly where the votes were counted and the totals made up.[21] The freeman, coincidently with the development of the proxy system, still retained the right of going to the capital in person and voting there if he wished.

For a time, the deputies from the towns seem to have passed their laws *ad referendum* and conditional upon the

[18] Cf. Bryce, *op. cit.*, pp. 600 *et seq.*

[19] Cf. John Adams to the Abbé de Mably, a French political moralist who had planned to write concerning American affairs at the Revolutionary time, Adams' *Works*, Vol. V, p. 495; Bryce, *op. cit.*, Vol. I, pp. 589 *et seq.*; De Tocqueville, *Democracy in America*, Bowen's Translation, 3rd ed., Cambridge, 1863, pp. 73 *et seq.*

[20] C. F. Bishop, *History of Elections in the American Colonies*, New York, 1893, p. 4.

[21] *Ibid.*, p. 127.

subsequent approval of the people. In Plymouth this was the method employed during a period in the seventeenth century [22] and in Rhode Island where the union of the towns was at first very loose, beginning with 1647, the representative principle was introduced, with the referendum as an auxiliary feature of the system. Early in the history of the colony law-making by direct vote passed through a number of interesting phases of development in Rhode Island, which are quite worthy of the place Mr. Bishop has recently given them in his work on the election systems prevailing in this country in colonial times. [23]

There are then the best of reasons for our deduction in regard to the first New England constitutions. There was a method at hand in New England by which an expression of popular opinion could be readily and economically secured. The people in their town-meetings had been made familiar with direct legislation respecting their local concerns. They knew something about the referendum in a larger class of colonial affairs. It was due to no reading of Rousseau or his literary contemporaries, nor to any anticipation of our admiration for Swiss political forms to-day, that the early Constitutions of Massachusetts and New Hampshire were submitted to popular vote. In many of the more southern colonies no ballot system of any kind was in existence.[24] There was instead a poll of the inhabitants. Even where the ballot was known there were no town meetings, and there existed no fiction that if the people did not actually participate in the making of their own laws they at any rate had a right to do this, having surrendered the privilege only rather conditionally to the deputy through a personal proxy. In Pennsylvania, for instance, where the ballot was a familiar feature at all elections there is clear proof that the channels between the individual citizens and the government were not kept so open as in New England. In 1777, when it was a question

[22] Bishop, p. 5.
[23] *Ibid.*, pp. 10 *et seq.*; cf. Rhode Island *Colonial Records*, p. 149.
[24] Bishop, p. 155.

of taking the sense of the people on the proposition to call a convention to frame a new constitution, a very crude plan was evolved by the Assembly. The people of each electoral district were to choose a special officer to be called a "commissioner". This commissioner was to make a house to house poll of his own district, asking each freeman whether or not he desired a convention. The freeman then must write "his vote or answer" upon "a scroll or piece of paper" which was to be placed in a "box or bag", kept in the possession of the commissioner.[25] This was a most inconvenient arrangement and it is suggestive of the electoral system in vogue in some of the southern provinces, in Virginia for instance where, it is said, officers were detailed to go from one plantation to another to collect the votes of the people when it was desired to consult them in regard to any given point of government.[26] In 1778, however, when the Pennsylvania Assembly resolved again to appeal to the citizens of the State for a direct expression of their opinion on the convention question, a much more modern method was proposed, the electors being invited to appear at their polling places and to deposit in the boxes ballots or "tickets" on which were written the words "For a Convention" or "Against a Convention", as the individual voter's choice might be.[27]

Even this plan, however, involving as it did the use of the election "machinery" in each separate district of the State, was far from simple or free of expense and in the absence of the town meetings in which the people of Massachusetts and New Hampshire, in the same manner that they determined upon many other affairs, voted to ratify, reject or amend a proposed constitution, there was an influence of a positive kind to deter the States outside of New England at this early day from a more general employment of this popular principle in law-making.

But before the referendum had spread farther afield, New Hampshire gave it another trial in 1792, when the Con-

[25] *Ante*, p. 50. [26] Bishop, *op. cit.*, p. 160. [27] *Ante*, p. 51.

stitution which is with amendments still in force to-day in that State, was submitted to popular vote. Connecticut and Maine in 1818 and 1819 respectively, both being States in which the town meeting was a familiar institution, referred their first Constitutions to the people. Rhode Island, another New England State which with Connecticut had still been acting under her old English charters, followed in 1824 with a Constitution which the people, however, refused to accept. The first State outside of New England to submit a constitution to popular vote was[28] New York in 1821, followed by Virginia in 1829, Georgia in 1833, Tennessee in 1834 and North Carolina and Michigan in 1835. From this time onward when the old States adopted new constitutions they were submitted to popular vote, and nearly all the new States admitted to the Union brought constitutions with them which had received the direct sanction of the citizens. The Congress of the United States in several cases indeed, recognized the principle, in the "Enabling Acts" making it a pre-requisite to statehood that the people should have assented to the fundamental charter under which they were to live.[29] Barring the constitutions framed by the revolutionary conventions of the Secession and Reconstruction periods in the South, there seems to have been, since Florida

[28] It is stated by Poore in his Note to the Mississippi Constitution of 1817 (Poore's *Federal and State Constitutions*, p. 1054) that it was submitted to popular vote. J. L. Power, Secretary of State for Mississippi, in his "Chapters on State History" says: "No proposition was made in the Convention to submit the Constitution to a vote of the people for ratification. It went into effect on the day it was signed, August 15, 1817. The original is in the office of Secretary of the State" (Magnolia, Miss., *Gazette* of Sept. 1, 1897). Poore also states that the Missouri Constitution of 1820 was submitted to popular vote (*op. cit.*, p. 1104). I am unable to confirm this, as the Secretary of State writes me that "the Capitol of Missouri was destroyed by fire in 1837 and all the records in the Secretary of State's office at that time perished in the flames, so that we can only go back to 1837 for official records". It appears to me unlikely that the Constitution was referred to the people and the State may safely be omitted from this list; cf. Jameson, *op. cit.*, appendix, p. 652.

[29] See the useful work by Dr. Max Farrand on "*The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895*".

pursued the course in 1839, no instance of a constitution being put into effect without a popular vote in any American State until Mississippi adopted this policy in 1890, being followed in a few years by South Carolina, Delaware, Kentucky (with respect to certain amendments and details) and Louisiana. Of the reasons which induced these States to leave the beaten pathway of constitutional practice in this country it will be more logical to speak in another place.[30]

In by far the greater number of cases the electors are twice consulted: First, by the legislature as to whether the convention shall be called or not, of which more will be said elsewhere in another connection; and secondly, by the convention itself when its labors have been finished and its draft of the constitution is complete. Some of the newer constitutions are specific on these points in our practice. For instance, in Idaho the Constitution, after indicating the course to be pursued by the legislature in calling a convention, provides that "any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people".[31] When the terms of the constitution are definite and mandatory the convention's duty in respect of submission cannot be brought into question. It is indubitable. The old constitution continues to be effective in all its parts until it is changed or abolished in some lawful manner,[32] and if it requires that a new constitution shall be approved by the people, this is a command which the convention must certainly obey. When the constitution, however, is silent regarding submission some interesting questions arise. In this event two classes of cases are distinguishable: (1) When the legislature in the "Convention Act" instructs the convention to submit its constitution to popular vote, and (2)

[30] *Infra*, pp. 120 *et seq.*

[31] Constitution of Idaho of 1889, art. xx, sec. 4; cf. Constitution of Montana of 1889, art. xix, sec. 8; Constitution of Utah of 1895, art. xxiii, sec. 3; Constitution of Washington of 1889, art. xxiii, sec. 3; Constitution of Wyoming of 1889, art. xx, sec. 4.

[32] Cf. Jameson, *op cit.*, p. 492.

when the convention, being without instructions, may presumably consult its own pleasure on the point.

Respecting the first case history furnishes a great deal of precedent so that the convention's course should not be in doubt. The legislature of Massachusetts in 1777, and again in 1779, when it authorized the election of delegates who should meet and frame a constitution for the State, at the same time specified that the completed constitution should be submitted to popular vote. The delegates, obedient to this command, submitted both instruments and the example has since been generally followed throughout the United States. All the constitutions have not been referred to the people, but there seems to be no instance in which a constitution was not so referred when the legislature's directions to the convention have been imperative. It is the accepted view to-day, as we have noted in the preceding chapter of this book, that so long as the legislature confines its instructions within reasonable bounds, its mandate may not properly be disobeyed and there is considered to be no element of unreasonableness in a request that the constitution shall be submitted to popular vote.

Concerning the second case, when the convention is without definite instructions from any outside authority, it is less easy to lay down the rule. Precedent to-day, however, is strongly in favor of a submission of the constitution. The tendency is unmistakable and few conventions in this century, except for special reasons when it has been desired to gain particular ends, as recently in Mississippi, South Carolina and Louisiana, have disregarded a law which, if unwritten, is a scarcely less binding part of our political system.

There is still another supposable and indeed actual case. The legislature sometimes makes the specific reservation in its "Convention Act" that the constitution which the convention frames shall not be submitted to the people, a recent instance of this kind having been furnished in Louisiana. An act of the legislature calling a convention to meet in that State in 1898 distinctly declared that the constitution

which it drafted should go into effect without a vote of the people.[33] If the legislature can bind the convention to submit a constitution it might be inferred that it could also bind the convention in the matter of not submitting a constitution. Nevertheless, it may not be quite safe to go so far as this, either in our theory or our practice, since, were a great matter of public policy involved, the doctrine might be fraught with serious dangers. Especially perilous might it become were we to dispense not only with the referendum on the entire constitution, but also with the preliminary vote on the proposition to call a convention.[34] At some stage in the process of changing the form of government the people, by the development of more than a century, must be held to have won the indefeasible right to a direct vote upon this important subject. We find an exception to the rule, it is true, in Mississippi so recently as in 1890. The present Constitution of that State was adopted in total disregard of this canon, a result for which the responsibility was divided. The legislature called the convention without asking the people whether they desired a convention to meet or not, and nothing was said in the "Convention Act" as to the convention's duty in submitting its completed constitution to popular vote.[35] The convention when it met and finished its work, having received no specific directions on the point, assumed the right to declare that the Constitution should go into effect at once without a referendum. This case we are bound to regard as a dangerous precedent and one little in sympathy with the spirit of American practice or experience.

Since constitutions are so universally submitted to popular vote they, and the bodies which frame them, have come to occupy a distinctly different place in the American scheme of government. "A State constitution," says Mr. Bryce, "is really nothing but a law made directly by the people

[33] Session Laws of Louisiana, 1896, pp. 85-87.
[34] Cf. Jameson, *op. cit.*, pp. 493-94 and p. 529, note.
[35] Cf. Laws of Mississippi of 1890, p. 53.

voting at the polls upon a draft submitted to them."[36] And again the same writer says that the convention is now an "advisory" rather than a "sovereign body".[37] Judge Jameson goes so far as to say that a convention is not a body of representatives at all, but an assembly of delegates who act as a legislative committee to propose laws of a certain character to the citizens.[38] If this seems to be an extreme view it is theoretically a quite correct one, and it is clear that a third legislative body has thus been introduced into the American practice, yielding us the legislature, the constitutional convention and the electoral body which have distributed among their three selves a work that in England, for instance, is performed by a single agent, the legislature. If we, however, look upon the convention as a committee exercising purely advisory powers, then it is no longer a legislative body. It must be sifted out of our system, in theory at least, while the citizens *en masse* become the legislative authority, enacting the constitution and giving to it its vitality and force. The delegates to the convention are only competent to vote and resolve, subject to the approval of another body, the people who commissioned them to their task.

In the face of recent events in Mississippi, South Carolina, Delaware, Louisiana and Kentucky it is possible, however, that we have got somewhat beyond bounds with our theories. The law of custom in regard to the submission of constitutions, which earlier seemed to be so strong that it could not be disobeyed, really appears to be not so inviolable after all, since it has lately gained more notoriety in the breach than in the observance. But whatever the theory no one should allow himself to be confused for a moment in regard to the actual facts. The convention may be a legislative body, or only an advisory legislative committee, but what practical men desire to know, is this—who makes the constitution? Do the people make it, or does the convention make it? In not a few instances, of course, the people have rejected con-

[36] *Op. cit.*, p. 436. [37] *Ibid.*, p. 667, appendix.
[38] *Op. cit.*, pp. 461, 530.

stitutions that were submitted to them. This is sometimes taken to mean that the electors have a knowledge of the subject superior to that which is possessed by the referring body. This conclusion cannot fairly be drawn from such a premise. Wisdom or knowledge of constitutional law, we all know, does not influence the motives, or control the actions of the great mass of citizens who vote to approve or reject a constitution. If a constitution reflects such qualities no one would claim that the people by the mere act of voting for or against it *in solido,* which is the usual method of submission, had injected anything of real value into the instrument. The character of the legislation contained in one of these great codes of law is better or worse according to the character of the men who have had a hand in framing it. If legislation which is received from a convention is more carefully considered and more honest than legislation received from a State legislature, it is so because of the greater talent and honesty of the men appointed to frame the law. The convention is extending its powers, is confining the legislature within narrower limits, and is giving form to our whole system of State and local government to an extent never known before because of the direct personal efforts to that end by the men who compose the convention. The members of the convention may be supported, as they undoubtedly are, by that rather intangible thing, a strong public sentiment. But the people are not likely to vote against a constitution because it is too long. They cannot be depended on to reject it because it treats of too many different subjects, and omits one detail, or includes another. It is true, of course, that the people could in most cases be aroused to reject a constitution which they believed would restrict them in the exercise of their accustomed rights. A violent change in the form of government, or perhaps a single "section" which should run counter to certain well-established convictions or prejudices would lead to the defeat of the whole instrument. Without a doubt, therefore, the people are a wholesome check upon the convention.

When the convention desires to escape the risk of having its whole constitution rejected, if the members are shrewd, they will submit debatable propositions separately, *i. e.*, such propositions will be taken out of the body of the instrument so that the people need not vote down the whole constitution in order to get at a few offensive lines. This device is not new. The first Constitutions of New Hampshire and Massachusetts were sent to the town meetings with the understanding that amendments might be proposed if the original drafts were not acceptable. The Council of Revision, in New York, when it vetoed the Convention Act passed by the legislature of that State in 1820, gave as one of the reasons for its action that the bill contemplated the acceptance or rejection of the constitution *in toto*.[39] It was the early experience, however, that the people by rejecting articles here and there as they chose would often wreck the entire constitution. There were large portions of the scheme of government which hung together. One part would have little worth without the other, and thus, allowing once more for the manifest inaptitude of unorganized bodies of men to make their own laws, it has come to be the rule that the general scheme itself must be approved or rejected as a whole. Specific propositions separately submitted are likely to be those in which the members of the convention have little heart, at any rate, though there is known to be a considerable body of public sentiment in favor of them. For instance, articles to extend the franchise to women and prohibiting the traffic in alcoholic liquors sometimes receive this kind of treatment, and the privilege of expressing themselves on these points the people often seem very highly to appreciate. To name only a few of the more recent cases: In 1889 when the Constitution of South Dakota was submitted to the people of that State three propositions were separately referred. These proposals were, (1) to prohibit the manufacture and sale of intoxicating liquors; (2) to establish a system of minority representation in the legislature,

[39] Jameson, *op. cit.*, Appendix F.

and (3) to select a temporary seat of State government.[40] When the Constitution of North Dakota was submitted to the people in 1889 there was a separate vote on the subject of prohibiting the liquor traffic. In the State of Washington in 1889 when the first Constitution was submitted to popular vote there were three accompanying propositions, relating again to woman suffrage, "prohibition" and the selection of a place to serve as the seat of government. The New York Convention of 1894 which made a number of changes in the Constitution of that State submitted its work in three parts, *i. e.*, in addition to the main body of the amendments there were two separate propositions, one making an apportionment of senators and members of the Assembly and a second introducing some regulations in reference to the improvement of the canals.[41]

Reverting to an earlier period in American history the question as to whether negroes should enjoy the right of suffrage was separately referred when the Iowa Constitution of 1857 was submitted to popular vote. The same subject was separately submitted by some of the early conventions in Kansas while the struggles between the slavery and anti-slavery advocates were in bitter progress; and when Oregon framed her first Constitution in 1857, New York adopted her third Constitution in 1846, and Illinois her second Constitution in 1848, articles granting equal suffrage to negroes or otherwise dealing with the race question, were

[40] The method of submission, which varies in the different States, according to the ballot system in use, was, in this instance, as follows: All persons desiring to vote for or against the Constitution or for or against any of the articles submitted to a separate vote might erase the word "Yes" or "No" as he desired and insert the name of the place which was his choice as the site for the State capital upon the ballot, the latter taking the following form. "For the Constitution—Yes—No"; "For Prohibition—Yes—No"; "For Minority Representation—Yes—No"; "For.....as the Temporary seat of Government". The vote upon the whole constitution was—Yeas 70131—Nays 3267; upon the prohibition proposition—Yeas 40234—Nays 34510; upon the proposal for minority representation—Yeas 24161—Nays 46200. Cf. Constitution of South Dakota of 1889, Schedule.

[41] *Journal* of the Convention, p. 963.

separately referred to the citizens of those States. When the Constitution of 1870 was submitted to a vote of the people in Illinois there were nine different points to which the electors were invited to assent: (1) As to the adoption of the whole constitution, *i. e.*, such parts of it as were not embraced in the portions separately submitted, (2) As to seven sections relating to the railroads in the article entitled "Corporations", (3) Concerning an article entitled "Counties", (4) Concerning an article entitled "Warehouses", (5) As to whether a simple majority or a three-fifths vote of the people in the counties should be necessary to decide the question of the removal of county seats, (6) As to a section in relation to the Illinois Central Railroad Company, a state-aided enterprise, (7) As to minority representation, (8) Permitting or prohibiting municipal subscriptions in aid of railroads or private corporations, (9) Concerning the sale or lease of a canal.[42]

As has already been said, barring the irregular conventions of the Secession period in our history at the South, not a single constitution appears to have been adopted in any State, since Florida took this course in 1838, which was not submitted to the people until Mississippi violated the American law of custom in 1890. In that year a conspiracy was entered into between the legislature and the convention to disfranchise a large body of the more ignorant of the electors, principally the negroes, who outnumbered the white inhabitants of the State. It was planned to accomplish this result through a prescribed educational qualification of a rather novel character. Each person applying to vote within the State must hereafter "be able to read any section" of the Constitution of Mississippi, or "be able to understand the same when read to him or give a reasonable interpretation thereof"[43] This was, ostensibly and in fact, a method of disfranchising a large body of citizens who had been en-

[42] Poore's *Federal and State Constitutions*, Vol. I, p. 493.

[43] Constitution of Mississippi of 1890, art. xii, on the "Franchise".

franchised some twenty years before by the Fifteenth Amendment to the Federal Constitution. As it was to be expected that the people, especially the negroes who were in the majority, would vote against the Constitution and thus defeat the plan, if it were submitted to them in the usual manner, the legislature and convention decided to take the matter into their own hands and the Constitution went into force without a referendum.

Another Southern State in which the negroes are a preponderating force and in which they outnumber the "whites", as in Mississippi, is South Carolina. In the year 1895 a convention met to frame a new constitution for that State. Unlike Mississippi, where even a preliminary vote on the convention question was dispensed with, the existing Constitution of South Carolina provided that any proposition to call a new convention should be approved by the people. The subject, therefore, was referred to popular vote by a joint resolution of the two houses of the legislature passed in 1892,[44] the necessary majority was secured at an election held in 1893 and the convention met without receiving instructions from the legislature as to the submission of the completed constitution.[45] The convention, once it had met, proceeded to adopt the "Mississippi system", requiring that each person who in future should apply for registration as a voter in that State should undergo a test as to his ability "to read any section in this Constitution", or to "understand it and explain it" when it was read to him. It was felt in South Carolina, as in Mississippi, that such a provision left a very wide field open to administrative discretion. A property qualification for voters was also introduced and the suffrage was hedged about by other restrictions meant to eliminate the negroes from the electoral body.[46] Lest its Constitution should be rejected the South

[44] Laws of South Carolina, 1892, p. 6.

[45] Cf. Convention Act, Laws of 1894, p. 802.

[46] Constitution of South Carolina of 1895, art. ii, on the Right of Suffrage.

Carolina Convention shrewdly decided that it would not submit the instrument which it had framed to popular vote.

In Delaware in 1895 a convention was called after a referendum had been taken in the manner required by the Constitution of the State. The legislature had declared in the Convention Act that "in the opinion of this legislature the constitution framed by the convention hereinbefore provided for should be submitted for the approval of the legal voters of this State." [47] This was regarded, however, as a mere recommendation of the legislature, rather than a positive mandate, and it had no influence in shaping the policy of the convention. The delegates adopted the Constitution definitively and it was not submitted to popular vote. In it, also, various experiments are tried with a view to preserving the "freedom and purity of elections". Any person desiring to qualify as a voter after January 1, 1900, it is specified, must be able "to read this Constitution in the English language and write his name".[48] It is scarcely to be supposed, however, that this provision would have served as cause for formidable popular opposition to the Constitution if the referendum had been taken. It manifestly was not meant to abridge the rights or privileges of any class of the people considered as a class. Numerically the negroes are not so strong a power in Delaware as in the more Southern States. Without having the Debates of the convention before me, I am inclined to accept the statement of a prominent Delaware lawyer in explanation of the convention's course on this occasion. He rather pertinently remarked in response to my inquiry: "The Constitution was not submitted to popular vote because it was felt that the delegates who were elected for this purpose knew more about making a constitution than the people did." Another consideration influencing the convention to adopt such a policy was undoubtedly the fact that it had been so hard to bring the body together. The people had voted on the subject repeatedly and there was no desire

[47] Sec. 8 of the Act; Delaware Laws of 1895, p. 231.
[48] Constitution of Delaware, 1895, art. v, sec. 2.

now to jeopardize a work which was the culmination of so many years of effort.[49]

In the case of the Louisiana Convention of 1898, which also did not submit its Constitution to popular vote, motives precisely similar to those at hand in Mississippi and South Carolina influenced the members to adopt their unusual course. The legislature had referred to the people the question of calling a convention, and they had decided it in the affirmative. In the same act the legislature in specific terms declared that the convention should have "full power to frame and adopt" a constitution "without submission to the people".[50] Agreeable to this grant of authority, and the understanding which existed among the political leaders of the State, the Constitution was not referred to popular vote. In this case greater cause existed for omitting the referendum than in the other two Southern States. The convention scarcely took the trouble to conceal its daring purpise which was of course to disfranchise large bodies of the negro voters.[51] Again the educational qualification with some modifications was resorted to, each person who applied for registration as a voter being compelled to write out his own application after a form composed of some eighty words. Failing, should he be not able to read or write to the satisfaction of the registration officers, he might qualify on any one of two other tests: (1) If he possessed property within the State assessed at a value of at least $300, and (2) if he were entitled to vote by the laws of any State prior to January 1, 1867, or should be a son or grandson not less than twenty-one years of age at the date of the adoption of this Constitution of some person entitled at that period to exercise the franchise. Citizens of foreign birth naturalized prior to January 1, 1898, were specifically excepted from the restrictions and need undergo none of the tests.[52] Thus with-

[49] *Infra*, p. 135.
[50] Acts of Louisiana of 1896, pp. 85-87.
[51] Art. 197 of the Constitution of 1898.
[52] Constitution of 1898, art. 197, sec. 5.

out openly purporting to do this, though the motive is ill-concealed, the Constitution excludes from the franchise just such classes in the electorate as the political leaders desired to reach. The illiterate negroes are not likely to have $300 worth of property, and did not enjoy the right of suffrage prior to 1867. The illiterate white men may possess $300 worth of property, or if they do not, are pretty certain with their sons and grandsons to get in through the curious provision about citizens of standing in 1867. Foreign naturalized citizens, who are nearly always white, are subject to no one of these harsh restrictions. Such discriminating tests have practically disfranchised all but a relatively small proportion of the negroes in Louisiana while touching none of the white voters. To have submitted such a constitution to the people would have been certainly fatal to its success, so the legislature issued directions which the convention carefully obeyed not to put the fate of the instrument in doubt by a referendum. This is the most peculiar case in the recent series in the South in that the legislature openly authorized the convention to dispense with the election. Nevertheless it must be remembered that a preliminary vote was taken to decide whether a convention should meet or not. It was Mississippi which omitted both the preliminary and subsequent votes and by premeditation and stealth violated all the rules of our unwritten law on this subject.

In Mississippi the conspiracy of the legislature and the convention, acting together to deprive the electors of any direct part in the adoption of the Constitution, became the subject of an interesting opinion by the judiciary of the State.[53] This opinion is quite out of harmony with the whole history of our constitutional development, marking a return to the theory that the convention is a "sovereign body", and therefore a revolutionary body if it selects to be, subject only to the one condition imposed by the Federal Constitution that the government which it establishes shall be "republican" in form, a term which has never been accu-

[53] Sproule *v.* Fredericks, 69 Miss., p. 898.

rately or satisfactorily defined, and is indeed so vague and uncertain in meaning that it would perhaps include any government whose chief magistrate was not called *eo nomine* an emperor or king. The judges in Mississippi have asserted, with historical tendencies nearly all opposing them, that it is only a theory of the "political essayist and the legal doctrinaire by which it is sought to be established that the expression of the will of the legislature shall fetter and control the constitution-making body". This was an *obiter dictum* in every sense, an opinion for which the court was not asked, since the legislature had made no attempt to bind the convention by commanding, or even recommending it to submit its constitution to popular vote. To require the convention to follow the legislative direction in the matter or obey the unwritten law of the land respecting a referendum on entire constitutions would be, the court declared, "to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers". The court chose to repudiate in unmeasured terms the whole doctrine of check or curb upon the authority of this unicameral law-making assembly, joining the other departments of the Mississippi government, the legislative, the executive, and the conventional in their cabal to restrict the suffrage rights of a large body of the citizens.

Another judicial opinion, scarcely more reassuring, is contributed by the Kentucky Court of Appeals.[54] It appears that the Constitution of Kentucky framed in 1891, while submitted to the people, as the legislature in the act calling together the convention had required[55], was altered and amended by the convention after it had been approved by and received back from the electoral body. By an ordinance passed in April, 1891, the convention referred its completed code to the people, adjourning to meet again in the following September. The referendum was taken during the recess, but the delegates when they reconvened voted to make cer-

[54] Miller *v.* Johnson, 92 Ky., 589.

[55] Acts of Kentucky, 1890, p. 124.

tain changes in the ratified instrument, some of which were of an important character. This raises another interesting point as to the rights and powers of the convention, one which seems hitherto to have received scarcely any attention. Nor has the Kentucky court yet given us any definite or proper precedent in respect of this subject, since it evaded the direct issue, which was again whether or not the legislature can bind a convention. If it were to submit its work to the people did this not mean its finished work, rather than a mere draft which it might later amend and rearrange to its own mind? The court on a technical point found in favor of the validity of the constitution in order, it would seem, to save the State from disturbance and expense which were sure to ensue if acts performed and proceedings already taken should be declared illegal. A new referendum would needs be held and indeed in case of an adverse popular vote a new convention might have to be assembled. So much difficulty had been experienced in bringing the late convention together that it was no pleasant prospect to think of doing all this work over again.[58] The court decided therefore that when the "political department" of the government had assumed and recognized the constitution to be a valid instrument it was not within the scope of the court's powers to compel a "co-equal department", *i. e.*, the convention, to perform its duty when the result would be to "bring confusion and anarchy upon the State". Such an opinion is without very much general legal interest and it contributes little to either side of this important discussion. It was dictated by considerations of temporary expediency and it must be viewed in this light. There was a vigorous dissenting opinion in which it was declared that the principle established by the court was "heavily laden with mischief to the inherent and inalienable rights of the people". A protest was therefore entered against the exercise by the convention of this "arbitrary power", which if "carried to its legitimate results would re-

[58] Infra, p. 134.

flect back the harsh grating of the dungeon door and the rattle of the tyrant's chains".

Although it is impossible to think that our entire historical development respecting this subject of a referendum on complete constitutions is now lightly to be disregarded, the recent practice in several States is calculated to unsettle many of our cherished theories. We are brought to these conclusions: that if the old constitution is silent as to the question of the submission of a new constitution, the legislature and convention cooperating,—in the South at least where public opinion seems not to discountenance it, especially when some particular end is to be gained thereby—may reckon without the electors as a ratifying force. In cases in which the legislature still demands a vote of the people, although the conventions of Delaware and Kentucky have come dangerously near the point of violating the law of American custom and tradition on this subject, there fortunately is yet no authority for extending to this unicameral assembly unlimited and sovereign powers which would release it from proper control. The Mississippi opinion [57] is at hand, of course, in favor of an unchecked convention, though this we can certainly regard as no very valuable or authoritative precedent. We seem to stand therefore just about where we did when Judge Jameson laid down his pen at the end of his masterly investigation of this subject, and Americans may entertain the hope that the rules governing the convention which he so clearly perceived and so well classified and which have our respect because they are the rules that have been developed out of our practice and experience, may not soon be departed from.

[57] Sproule *v.* Fredericks, *loc. cit.*

CHAPTER V

THE AMENDMENT OF CONSTITUTIONS BY CONVENTIONS

ANOTHER topic is now to be considered, and this has to do with the development of the system by which the State constitutions may be amended. When constitutions are to be changed, the normal method, as we have seen, is by calling together a new convention, if these changes are so important as to amount to a general revision. Coincidently with the referendum on whole constitutions, if not somewhat antedating it, there has developed another referendum, on the subject of assembling a new convention. The electors in the States are themselves to determine, (1) whether the constitution or form of government which the convention has framed, shall be adopted, and (2) when the constitution or form of government has been adopted, whether it shall be abolished or changed. Such a poll of the people to decide upon the expediency of calling a convention to revise the constitution, was proposed in Pennsylvania in 1777, and 1778,[1] though the legislature rescinded its action before the referendum was really taken. The Massachusetts legislature in 1779, desiring to ascertain the sense of the people respecting a new government, asked the electors to decide whether a convention should be called or not. Their answer being in the affirmative, John Adams' Constitution was framed and submitted to popular vote, the first constitution in the United States, to be made the subject of a plebiscite.

The Constitution of Pennsylvania of 1776, and the early Constitutions of Vermont, provided for their own amendment through that curious and unsatisfactory body the Council of Censors. When this Council proposed amendments, they

[1] *Ante*, pp. 49-52.

were to be submitted to a convention specially chosen for the purpose of considering them. This method of revision was abolished in Pennsylvania in 1790, but it continued to be a feature of the constitutional practice of Vermont until 1870, several conventions having met under authority derived from this odd provision, and the Constitution having been several times amended by this process. The Constitution of Massachusetts of 1780, provided that in 1795 the election officers in the various towns, etc., should "collect the sentiments" of the people concerning "the necessity and expediency of revising the constitution in order to amendments". Upon a two-thirds vote of the people, a convention was to be called by the General Court or legislature.[2] The Georgia Constitution of 1777 also provided for a convention, when it was a question of altering the constitution, but upon the presentation of petitions bearing the signatures of a majority of the voters in each county, instead of an actual assembling of the votes pro and con at the polling places.[3]

The Constitution of New Hampshire, adopted in 1784, contained a clause which made it necessary for the legislature to call a convention, at the end of seven years, or in 1791. This provision was self-executory, the convention meeting without a reference of the subject to popular vote. No alteration should be made in the constitution by the convention, however, unless it were first "laid before the towns and unincorporated places" of New Hampshire, and approved "by two-thirds of the qualified voters present, and voting upon the question".[4] By the New Hampshire Constitution of 1792, the people were to be polled at the expiration of

[2] Constitution of Massachusetts, chapter vi, art. x.

[3] Constitution of 1777, article lxiii.—"No alteration shall be made in this Constitution without petitions from a majority of the counties, and the petitions from each county to be signed by a majority of the voters in each county within this State; at which time the Assembly shall order a convention to be called for that purpose, specifying the alterations to be made, according to the petitions preferred to the Assembly by the majority of the counties as aforesaid."

[4] Cf. final paragraph of the Constitution of New Hampshire of 1784.

every seven year period, on the subject of calling a convention to revise the fundamental law of the State. It was again provided that all amendments originating in this manner should be laid before the people assembled in the town meetings.[5] In Delaware by the Constitution of 1792, the electors were declared to be the only authority competent to decide the convention question.[6] Kentucky by the Constitutions of 1792 and 1799, and Tennessee by the Constitution of 1796, left it to the people to determine when a convention should be assembled.

It soon came to be so generally understood that it was a prerogative of the citizens at large directly to determine this important point, that the "Council of Revision", the plural vetoing power in New York, vetoed a bill which had been passed by the legislature of that State in November, 1820, and which authorized a constitutional convention without first securing the people's consent. Chancellor Kent, a member of the Council, prepared the statement which accompanied the bill on its return to the legislature, with the Council's disapproval. The first reason for the Council's dissent was that the convention would meet "without having first taken the sense of the people whether such a convention for such a general and unlimited revisal and alteration of the Constitution be in their judgment necessary and expedient". The various precedents were carefully examined, and it was asserted thus early in the century in the leading State of the Union, by a body composed of some of the ablest legal minds in the United States, that the law of custom as it had been developed in this country with respect to this

[5] Constitution of 1792, sections 99-100.

[6] Constitution of 1792, article x.—"No convention shall be called but by the authority of the people; and an unexceptionable mode of making their sense known, will be for them at a general election of representatives to vote also by ballot, for or against a convention, as they shall severally choose to do; and if, thereupon, it shall appear that a majority of all the citizens in the State having right to vote for representatives, have voted for a convention, the General Assembly shall, accordingly at their next sessions call a convention", etc.

subject, was not to be lightly set aside. The Council said: "The declared sense of the American people throughout the United States on this very point, cannot but be received with great respect and reverence; and it appears to be the almost universal will expressed in their constitutional charters, that conventions to alter the constitution shall not be called at the instance of the legislature, without the previous sanction of the people by whom those constitutions were ordained." The Council declared that there ought to be two referenda, one to determine, in the first instance, as to the general expediency of calling the convention, and a second as to the advisability of accepting the work of the convention, and promulgating it as the constitution of the State.[7] The legislature, having failed to do its part well in 1820, thereupon in the following year took up the subject again, and passed a law which properly embodied the Council's recommendations.[8] The people were to vote "Convention" or "No Convention", as they might prefer, and such changes as the body might make in the organic law, should the people authorize it to meet, would have then to be submitted "to the decision of the citizens of this State * * * together or in distinct propositions as to them [the members of the convention] shall seem expedient".

Nearly all the constitutions now contain definite provisions on this subject. When the legislatures leave it to the people to decide whether a convention shall be called or not, they do so as a rule, pursuant to no law of custom, nor by virtue of any implied power, but because of an imperative command in the constitution. For instance, the Constitution of Utah, the newest of the States, declares:[9] "Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend

[7] See the objections of the Council to the bill calling a convention, dated Nov. 29, 1820. This paper may be conveniently referred to in Jameson's *Constitutional Conventions*, Appendix F.

[8] Cf. Hammond's *History of Political Parties in the State of New York*, Vol. I, p. 539; Laws of New York, 1821, p. 83.

[9] Art. xxiii, sec. 2.

this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention, and if a majority of all the electors voting at such election shall vote for a convention, the legislature at its next session shall provide by law for calling the same."

The Constitution of Delaware of 1897, another recently adopted instrument, treats this subject as follows: "The General Assembly by a two-thirds vote of all the members elected to each house, may from time to time provide for the submission to the qualified electors of the State at the general election next thereafter, the question 'Shall there be a convention to revise the Constitution and amend the same?' and upon such submission, if a majority of those voting on said question shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide for the election of delegates to such convention at the next general election."

It appears that thirty of the forty-five different State Constitutions contain definite provisions of a similar kind respecting a referendum on the convention question, and in only fifteen is the legislature left to decide upon its own authority what it will do in the matter, when the occasion arises, and a general constitutional revision is required.[10]

A closer examination of these Constitutions will show that in seventeen of the thirty cases, the method of submission is as in Utah and Delaware,—*i. e.*, in pursuance of an affirmative vote of two-thirds of the members elected to the legislature. In one State, Nebraska, three-fifths of the members must concur before the subject is submitted. A simple majority of the members of the legislature voting on the question, as in the case of other laws, seems to be sufficient to bring the matter to the referendum in Alabama, Missouri and Tennessee, while in Wisconsin an ambiguous "majority of the Senate and Assembly", and in West Vir-

[10] These fifteen are Arkansas, Connecticut, Georgia, Indiana, Louisiana, Maine, Massachusetts, Mississippi, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, Texas, and Vermont.

ginia "a majority of the members elected to each house of the legislature" are required. In Kentucky the proposition must be approved by a majority of all the members elected to the legislature, in two successive General Assemblies, a rather effective curb upon hasty or precipitate action.

In another class of States, following the example of Massachusetts and New Hampshire, the Constitutions specify that the subject of calling a convention shall be submitted to the people by the legislature at regular intervals; in New Hampshire every seven years, in Iowa in 1870 and each tenth year thereafter, in Michigan in 1866 and each sixteenth year thereafter, in Maryland in 1887 and every twenty years following, in Virginia in 1888 and thenceforward at periods of twenty years, in New York in 1916 and every twentieth year thereafter. In these cases it is often declared expressly that the legislature may submit the question at other times when it may consider this policy to be expedient, *e. g.*, in New York, Michigan and Iowa, and where not so declared there is a fair implication that it may do so.

In the referendum on the convention subject, it is the almost uniform practice that a majority of the votes cast, determines the fate of the proposal. In Kentucky alone is this rule definitely qualified and there it is necessary, if a majority shall be in favor of the question, that the total vote for the convention shall be equal to at least one-fourth of the number of votes cast in the last general election in the State, a limit which is certainly not high, and established in a righteous spirit with a view to safeguarding the State against a convention which might perhaps receive its mandate from a very small minority of the citizens. Although Kentucky, by her Constitution of 1891, still throws some difficulties in the way of the legislature in assembling a convention, the process is simplicity itself, in comparison with that which some very shortsighted men introduced in the State Constitution of 1850.[11] This odd system comprised a vote of

[11] Article xii.

"a majority of all the members elected to each house of the General Assembly", and two subsequent "ratifying votes of a majority of all the citizens of this State entitled to vote for representatives", taken at successive general elections for members of the legislature. Thus more than four years were required to call a convention, granting that it were at all possible to fulfill so difficult a condition as securing for the proposal a majority, not of the votes cast, but of all those entitled to be cast, and not once, but on two occasions and at succeeding elections. For instance, one General Assembly could vote to submit the question to the people, but the people could not be consulted until the next election for representatives nearly two years later, and the proposition could not be approved a second time before another period of two years had elapsed. The act definitely authorizing the convention, then, was still to be adopted by the Assembly at a subsequent session. Strangely enough, there was no other method of amending the Constitution of Kentucky, than by convention. Upon the legislature was conferred no power of initiation, with respect to separate amendments, which it now possesses so generally in the various States. Such a thing as changing the Constitution was for long years, therefore, a practical impossibility. Although sporadic attempts were earlier made to meet the conditions precedent to the calling of a convention, there was not a single regular session of the legislature, beginning with 1879-80, until the convention was finally authorized in 1890, when this subject was not before the General Assembly of Kentucky State. The necessary popular majorities were at last secured, in 1887[12] and 1889, the members of the convention were elected in 1890, and in 1891 the old Constitution was superseded by a new one in which good care was taken that the State should not again get into such a trap.

Delaware, under the Constitution of 1831, which was in force until a very recent date, had somewhat similar trials in

[12] Laws of Kentucky, 1887-8, p. 4.

the course of her attempts to assemble a new convention. Here, too, if a convention were to be called, the proposition must be approved by "a majority of all the citizens in the State having right to vote for representatives".[13] This majority, it was specified, should be ascertained "by reference to the highest number of votes cast in the State at any one of the three general elections next preceding". The convention question was to be voted on by the people, at a "special election", when as American experience has demonstrated, it is even more difficult to bring together any large number of men who have definite views to express respecting public questions, than at general pollings, a point which deserves to be dwelt on more at length in another place. At the election on November 1, 1887, the vote on the subject of calling a constitutional convention was 14431 yeas and 398 nays, the number of votes required being 15640. At the election of May 19, 1891, there were 17105 votes for a convention, and 115 against it, the number of votes required at this time having increased to 17674.[14] However, the Delaware Convention of 1831 had not, like the Kentucky Convention, excluded the legislature from changing the Constitution. Amendment could be effected by a two-thirds majority vote of one legislature, and a three-fourths majority vote of the next (without a referendum). After various fruitless endeavors to call a convention by the method regularly prescribed, the legislature at last set itself to the task of adopting an amendment, which would change this troublesome provision of the Constitution and open the way to a revision of the entire instrument.[15] The Delaware Convention, which soon met, disposed of the last trace of this old check, and put the State in line with the other Commonwealths, where the tendency had been at work for a long time to make it easy

[13] Constitution of 1831, art. ix.

[14] Cf. McPherson's *Handbook* for 1888 and 1892.

[15] Laws of Delaware, 1893, chapter 540. The amendment simply authorized the vote to be taken at a general instead of at a special election.

rather than hard for the agents charged with this task, to effect changes in the constitution.

We need, too, to look at the case in which the constitution is silent on the point of the legislature calling a convention. What, then, is the legislature's duty? Has it the power to call a convention anyhow, without express constitutional authorization to that effect, and if so, is it restricted as to the ways and means to be adopted in attaining this end? When the constitution says that it shall be amended by some one particular method, and that method is not by convention, explicitly stating that no other shall be employed, it seems to be admitted that to act in contravention of the terms of that instrument, would be revolutionary, an offence no smaller than to violate any other constitutional provision.[16] For instance. the Constitution of Delaware of 1776, a very imperfect instrument, we will all say, at least in this respect, provided, after declaring that certain portions of the Constition "ought" never to be violated "on any pretence whatever", that "no other part * * * shall ever be altered, changed or diminished without the consent of five parts in seven of the Assembly, and seven members of the Legislative Council".[17] It must be remembered, of course, that the legislature might have changed that part of the Constitution giving it the sole right to amend the same, just as it might have changed any other portion of the instrument. Then the convention, apparently prohibited, could have been legitimated by the legislature by way of a constitutional amendment. It is Judge Jameson's opinion that such a provision inhibited the amendment or general revision of the constitution by a convention or by any other authority than the General Assembly. There was no implication of power on the part of the legislature to call a convention, the Constitution having omitted to give its directions on the point. Such an assumption would have been quite unwarranted, for "no power can be implied in the face of a direct and ex-

[16] Jameson, *op. cit.*, pp. 600-601.
[17] Art. xxx.

press prohibition ".[18] But where there is no prohibition of the exercise of the power or allegation of the existence of the right of the legislature to call a convention, for the purpose of amending the constitution, that prerogative rests with the General Assembly by inference, as a part of the general grant of legislative authority.[19]

The case, too, is distinguishable of a constitution which establishes an alternate mode of amendment, without having expressly prohibited the use of the convention method, as the framers of the Delaware Constitution of 1776 are held to have done. We will soon sketch the development of what has been called the legislative mode of amendment, that is, one by and through the legislature, which is meant to simplify the problem of constitutional change, and save the State from the cost and labor of putting the cumbrous convention system into operation. Now, when the constitution specifies that it may itself be amended by the legislature in such and such a manner, and there is no word in disparagement or prohibition of any other method, are we to infer that the elder and primal method by convention has been interdicted? Assuredly not. There is the force of a great deal of precedent and principle to show that such a claim would be quite untenable.[20] The fact has been clearly established that the legislative mode, except when there are express declarations to the contrary, is intended only to cover the case of a few specific alterations in the fundamental law, —one, two or a half dozen. A convention on the other hand, is an agency by which the entire constitution is revised, and although it may after investigating the subject, recommend only a partial remodelling, the opinion is entertained by those who have called the convention together, that large changes are needed, and the body undertakes its labors committed to this task. There are thus two separate agents to accomplish two separate objects, and one agent exercising its prerogative, cannot prejudice the other in the exercise of its peculiar

[18] Jameson, p. 601. [19] *Ibid.*, pp. 211, 601. [20] *Ibid.*, p. 615.

rights. The constitution may be wholly silent in regard to the calling of a convention; it may specify that separate amendments may be initiated by the legislature, but if there is no prohibition respecting the convention as an agency for the general revision of the constitution, there is the unmistakable implication that this agency may be employed.[21] Up to 1887, Judge Jameson found that in the history of our practice twenty-seven conventions had met without special authority for their assembling having been contained in the State constitutions [22] and since that time at least two conventions have been added to the list,—Mississippi's in 1890, and Louisiana's in 1898. Our custom has so well established the rule upon this point, that it is too late now to question the legitimacy of these conventions.[23]

The converse of this proposition, as we will see on a later page, is not true, for there is no inferable power resting with the legislature to change the constitution in a smaller way, unless definite provisions can be pointed to in that instrument, to which the right to exercise such a prerogative may be traced back. The legislature when it acts alone, or in conjunction with the electors in adopting amendments to the constitution, does so in an unusual capacity. It acts as a convention, not as a legislature, and it must be able to justify its course at every step. It serves us thus on sufferance only, and it has won its title to this share in constitutional lawmaking, because it is realized that the great, long, and detailed constitutions of to-day must be frequently changed, and some method must be at hand, simpler and less expensive than calling delegates together from all parts of the State, for the special purpose of making these minor changes in the language and spirit of the instrument.[24]

Now, when the legislature is not specifically prohibited

[21] Jameson, p. 211.—"It must be laid down as among the established prerogatives of our general assemblies that the constitution being silent, whenever they deem it expedient they may call conventions to revise the fundamental law."

[22] *Ibid.*, p. 210. —— [23] *Ibid.*, p. 602.

[24] *Ibid.*, pp. 549, 621, 622.

from calling a convention (a case of only theoretical interest), and it acts upon authority derived from general implication alone, what direct part are the people to play in the proceeding? May the referendum respecting the expediency of issuing the call be dispensed with by the legislature? The weight of authority is distinctly on the side of a submission of this question to the people. The opinion of the New York Council of Revision, in 1820, which is cited so frequently,—that body, clothed with a power later conferred in nearly all our States upon the Governor alone, without whose assent to a bill, none could become a law except by a two-thirds vote over the veto,—is against a convention assembled at the sole instance of the legislature. The New York Constitution of 1777, which it was proposed should be changed, contained no word concerning the method of calling a convention, nor did it seem to contemplate the case arising when such a body would need to be convened. The Council, nevertheless, unhesitatingly declared that it was the duty of the legislature to submit the question, just as it was its prerogative in general to set the machinery in motion for a convention to assemble, despite the Constitution's silence in reference to that larger point. Because the legislature had failed to provide for a poll of the people, the Council had vetoed the bill, and the former acting in pursuance of better advice, promptly passed a measure to refer the matter to the electors of the State.

Doubtless it is within the power of the legislature, when the constitution contains no specific directions to the contrary, to call a convention, without first acquainting itself with the sense of the people on this subject. Even in those States in which the constitution is not wholly silent on the point, and a method is prescribed for calling a convention, though without a definite command as to the submission of the question to popular vote, the legislature may undoubtedly omit this latter feature of the process. Perhaps there is here an added implication that the plebiscite is unnecessary, but lacking the constitutional mandate to dispense with the vote,

the legislature may, of course, require the popular sanction, and if it desires to keep itself in line with all our historical tendencies, it will make no effort to evade what must be considered to be its manifest duty in the case. For instance, the Constitution of Georgia declares that "no convention of the people shall be called by the General Assembly to revise, amend, or change this Constitution, unless by the concurrence of two-thirds of all the members of each house of the General Assembly".[25] It contains no command to submit, nor prohibition from submitting to the electors by way of the referendum, the question of the expediency of the call, and without a doubt, the legislature can refer the subject to them or not, at its own pleasure.[26]

Of one thing there seems to be some certainty, if our practice is closely studied and the lessons which it teaches are rightly viewed and considered, and it is this—that the people should be directly consulted at some stage in the process of constitutional change. One or other of the two referenda, either the preliminary vote to decide as to the expediency of calling the convention, or the vote upon the acceptance or rejection of the whole constitution after the convention has framed it, should be taken.[27] If we look at those States in which constitutions have recently been adopted without a reference of the instruments to popular vote, Mississippi, South Carolina, Delaware, Kentucky (in part), and Louisiana, there is but one case, that of Mississippi in which the legislature, or the legislature and convention acting together, took the matter wholly out of the people's hands, and

[25] Constitution of 1877, art. xiii, sec. 1, par. 2.

[26] A usual form in which to submit this subject, since more modern ballot systems have been introduced, is as follows: "For the [or a] Convention", "Against the [or a] Convention", as in California and Tennessee; "Shall there be a Constitutional Convention—Yes", or "No", a space for the voter's mark being left after either word, as in Minnesota; "For a general revision of the Constitution—Yes" or "For a general revision of the Constitution—No", as in Michigan; "Constitutional Convention—Yes" or "Constitutional Convention—No", as in Ohio.

[27] Cf. Jameson, *op. cit.*, p. 494.

withdrew from them all part in the proceedings, both before and after the convention met. It is true that in South Carolina, Kentucky and Delaware, the old Constitutions required that conventions should be called only after a polling of the people, and in Kentucky the vote had to be taken on two occasions, but the fact remains that it is now only in the rarest instance that all our agents which co-operate to this end, fail us, and a constitution is added to the American collection, without the people having said by yea or nay, somehow, at sometime, whether or not they are ready to make this change in their organic scheme of government.

CHAPTER VI

THE AMENDMENT OF CONSTITUTIONS BY THE LEGISLATIVE METHOD

Another method of amending the constitution, the legislative method, remains to be specifically considered. It was the practice in England, whence we got so much that is valuable in our political forms, to receive constitutional as well as statutory law from Parliament or the legislature. We had introduced Montesquieu's trinity of English agents, the legislative, executive and judicial departments of government, each balanced against and checking the two others. But we were to go farther, and bring upon the scene a fourth brake upon the wheel, the convention, differentiating constitutional and ordinary law, not only in its intrinsic character, but as well in respect of the source from which it was derived. The legislature for a time in this country, was almost entirely without power in the matter of constitutional law-making, except as the agent to call the convention together. In those early cases in which the legislature itself attempted to act as a convention, the constitutions were considered to have been irregularly adopted, and therefore invalid.[1] It came to be pretty generally understood that what the legislature was not competent to make, it also was not a suitable authority to break down or change. If experience should later show that amendment was needed, it was plainly stated, or fairly implied in the constitution, that the mode at hand was to call another convention. The Constitutions of 1776 in Delaware and Maryland, indeed, gave to the legislature rather general powers to change those instruments under certain safeguards, calculated to prevent hasty and ill-

[1] *Ante*, p. 74.

considered action. In the Maryland Constitution, it was specified "that this form of government and the Declaration of Rights, and no part thereof shall be altered, changed or abolished, unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly after a new election of delegates, in the first session after such new election". Here was a plan for amendment by simple majority vote of two successive legislatures, and in lieu of the referendum there was introduced the device of publishing the proposals for the consideration of the people prior to the election of the members of the General Assembly which should pass upon them the second time.[2]

In Delaware the Constitution of 1776 prescribed, with the exception of some cases not to the purpose here, that no part of the Constitution should ever be "altered, changed or diminished without the consent of five parts in seven of the Assembly, and seven members of the Legislative Council".[3] Thus of the Constitutions of the Revolutionary time in those of two of the original States, the legislature was created the agent for amending the Constitution.[4] In the Constitutions of New Jersey, New York, North Carolina and Virginia, there were no provisions on this subject. In New Hampshire, Massachusetts and Georgia, the convention method was adopted, as it was also in Pennsylvania with the addition of that odd feature, the Council of Censors. As silence is an inference in favor of the convention, there were then but two States of the eleven (the other two needed to make up the "original thirteen" being Connecticut and Rhode Island, and they retained their English charters) which held the legislature to be competent in amendment, even with respect

[2] Art. lix. [3] Art. xxx.

[4] The example of South Carolina in 1778 may be disallowed, for the Supreme Court of that State decided that as the Constitutions of 1776 and 1778 had both been framed by the legislature, the latter could at its own pleasure change them again.

to minor details. It is true, of course, as Judge Jameson has very clearly shown, that these original Constitutions, if we except those of Massachusetts and New Hampshire, which adopted their instruments near or after the conclusion of the war, were merely intended to serve temporary ends, until independence should be secured, if, indeed, that much desired result could be attained. The effort for independent government failing, the constitutions would have had little future value anyhow, not more than those which were framed by the Secession conventions in the Southern States at the outbreak of the great Civil War. There was little thought then of how the constitutions should be changed; the pressing question was to establish them, adopt them and live under them. Systems by which to amend the instruments of government were to be devised at a somewhat later date.

The need was soon felt, and it had been prophetically anticipated in Maryland and Delaware in 1776, for some easier mode of amendment than by assembling a new convention. The legislature was holding sessions frequently. While it was engaged in its own specific line of work, it might too act in the capacity of a convention in adopting, or at any rate in proposing for adoption, such amendments to the constitution as might seem to be required from time to time for the good of the State. From the beginning it was understood that in enacting constitutional law, even to this extent, the legislature was stepping outside of its own rightful province. It ought to be more difficult for the legislature to amend the constitution than to pass an ordinary law. Delaware, therefore, had specified that changes in her Constitution should be made only with "the consent of five parts in seven of the Assembly, and seven members of the Legislative Council".[5] Maryland declared that the legislature, if it should desire to alter the Constitution of the State, must announce its intention to the people by publication, and twice approve its proposition for amendment, though a simple majority vote on each passage suf-

[5] Art. xxx.

ficed. In the Constitution of South Carolina, in 1790, a somewhat similar provision was introduced. Amendments were to be proposed in one legislature, published for the information of the people previous to the next election of representatives, being then confirmed by the next legislature. A two-thirds vote "of the whole representation" in both branches was necessary at each passage, however, a condition tending to make it still more difficult for the legislature to exercise its amending power.[6] A provision almost the exact counterpart of that found in South Carolina, was incorporated in the Georgia Constitution of 1798,[7] and the second Constitution of Delaware adopted in 1792 arranged for its own amendment by the legislative mode, though again in a slightly different form, viz: a two-thirds majority vote of each house of one legislature, "with the approbation of the Governor", the publication of the proposals for popular consideration, and a three-fourths vote of each branch of the next legislature.[8]

Constitutional amendment by legislature originated in the South, and there had its most notable early developments. But in no case did the amendment come nearer to the people than in printing and circulating it for their consideration, three or six months before the next election for representatives whose duty it would be to ratify the proposed change. The rejected Constitution of New Hampshire of 1779, contained a provision for its own amendment, which specified that "the General Court shall have no power to alter any part of this Constitution, but in case they should concur in any proposed alteration, amendment or addition, the same being agreed to by a majority of the people, shall become valid".[9] The Constitutions of New Hampshire adopted in 1784 and 1792, provided that alterations in the constitution should be "approved by two-thirds of the qualified voters present, and

[6] Constitution of 1790, art. xi. [7] Art. iv, sec. 15.
[8] Constitution of 1792, art. x.
[9] Sec. 32 of the Constitution, which is printed in the Collections of the New Hampshire Historical Society, Vol. IV, p. 154.

voting on the subject " at the various town meetings, but the changes which were contemplated were to come from a convention and not from the legislature. It is Connecticut in 1818, when she abandoned her old charter and adopted her first Constitution, that won for herself the historical distinction of having originated the plebiscital method which was destined soon to meet with general application throughout the States. It was the New England system of a popular vote upon constitutions or parts of constitutions, received from conventions, grafted on to the Maryland scheme of amendment by legislature, which was generally coming into vogue in the South. Instead of simply publishing the proposition " for the consideration of the people ", the people were to have the whole subject directly referred to them, so that each elector might say for himself whether he approved of the amendment or disapproved of it. Moreover the poll of the citizens was not introduced between the two votes of the legislature, a system which soon came into favor in the Southern States, but after that body had both times passed the measure. To the people the last word was given. The Connecticut plan did not call for simple majority votes twice repeated, nor yet for two-thirds majorities, but as if to strike another compromise among the various precedents at hand, the Constitution prescribed that at the first passage a simple majority should suffice, and curiously, of but one chamber (the House of Representatives) while at the second passage a two-thirds vote in each of the two houses would be necessary. A difficulty was averted in the subsequent ratifying vote of the people, by providing that a simple majority of those voting, rather than some larger number, should determine the point as to the approval of the amendment. This interesting Connecticut provision is, in full, as follows:

" Whenever a majority of the house of representatives shall deem it necessary to alter or amend this Constitution, they may propose such alterations and amendments, which proposed amendments shall be continued to the next General Assembly and be published with the laws which may have

been passed at the same session; and if two-thirds of each house at the next session of said Assembly, shall approve the amendments proposed by yeas and nays, said amendments shall by the secretary be transmitted to the town clerk in each town in the State, whose duty it shall be to present the same to the inhabitants thereof for their consideration at a town meeting, legally warned and held for that purpose, and if it shall appear in a manner to be provided by law that a majority of the electors present at such meetings shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this Constitution." [10]

The Massachusetts Convention of 1820, of which Daniel Webster was a member, he himself having had a part in giving form to this particular provision, adopted the Connecticut plan with but slight modification. This Convention did not frame an entire new constitution, but simply submitted to the electors of the State a number of proposals for the amendment of the instrument. The Constitution having been deficient in respect of a method for its own change, in case any "specific and particular amendment or amendments" should be needed, the example which Connecticut had set the country was studied with interest in Massachusetts. This section as it was proposed by the Massachusetts Convention in 1820-21, and was ratified by the people in 1822, specified that the proposal for amendment should be passed by a majority vote of the Senate, and a two-thirds vote of the House of Representatives of one legislature, and a like vote of the two branches of the next succeeding legislature, when, if it were referred to the people, and a majority of the qualified electors voting on the subject should approve it, it should become a part of the Constitution of the State.[11]

[10] Constitution of 1818, art. xi.

[11] Amendments to Massachusetts Constitution of 1780, art. ix. The text of the provision is as follows: "If at any time hereafter any specific and particular amendment or amendments to the Constitution be proposed in the General Court, and agreed to by a majority of the senators and two-thirds of the members of the house of representatives present and voting thereon, such proposed amendment or amend-

The New York Convention which met at about the same time, in 1821, incorporated in the Constitution which it framed, a similar provision for the amendment of the instrument. There was here once more a slight variation in respect of terms and forms, but the referendum was again made to follow the vote of two successive legislatures. A simple majority vote of both houses of the first legislature sufficed, while a two-thirds majority vote in both houses was necessary on the second passage, in order to bring the subject to the people.[12]

In the meantime, about a year after the Connecticut plan of amendment was adopted, Alabama being admitted in 1819 to the Union of States brought with her a Constitution containing a provision for its own alteration of still a different kind. It was a modification of the Maryland scheme of 1776, with a plebiscite introduced after the proposal came from the

ments shall be entered on the journals of the two houses with the yeas and nays taken thereon, and referred to the General Court then next to be chosen, and shall be published; and if in the General Court then next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of the senators, and two-thirds of the members of the house of representatives present and voting thereon, then it shall be the duty of the General Court to submit such proposed amendment or amendments to the people, and if they shall be approved and ratified by a majority of the qualified voters voting thereon at meetings legally warned and holden for that purpose, they shall become part of the Constitution of this Commonwealth."

[12] Constitution of 1821, art. viii, sec. 1. This provision was as follows: "Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen; and shall be published for three months previous to the time of making such choice; and if in the legislature next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature, voting thereon, such amendment or amendments shall become part of the Constitution."

legislature the first time, and before it was submitted to that body for final confirmation.[13]

Maine, forging ahead of the parent State, Massachusetts, from which she had just voted to separate, in order to organize an independent government adopted in her Constitution, framed in 1819, a scheme of amendment by legislative means, which in breaking the way to a future type, is entitled to rank with the rather famous Connecticut plan. Maine, before Massachusetts and New York had yet gathered their delegates together to discuss the question, had swung over to one legislature instead of two, simplifying the whole process. A two-thirds vote of both houses of the legislature was required to pass the proposal but everything else was left to the people, a simple majority of the qualified voters who chose to express an opinion on the subject being competent to declare the popular will. This section of the Constitution of Maine, still in force in that State, is as follows:

"The legislature whenever two-thirds of both houses shall deem it necessary, may propose amendments to this Constitution, and when any amendment shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question, whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this Constitution." [14]

It was the example of such States as Massachusetts and New York that turned the balance in favor of the legislative mode of amendment in general, and of the system embodying

[13] Constitution of 1819, final paragraph preceding the "Schedule".

[14] Art. x, sec. 2, of the Amended Constitution, and article x, sec. 4, of the original Constitution.

the referendum in particular. After these great States had spoken, the development was rapid and natural until we have come to the point to-day, when there is not a State Constitution among all our forty-five, except New Hampshire's, which does not contain some kind of a provision respecting its own amendment through legislative initiative, and with but one exception, Delaware, there is a later reference of the subject to the people.[15] Delaware by her Constitution of 1831, long enjoyed the reputation of being the only State in the Union which amended her fundamental law without directly consulting the people on the different points involved, and she has chosen to hold to this feature of her policy, since by her new Constitution of 1897, there is still no referendum on amendments, the legislature changing the instrument from time to time, practically by the same process invented by the Maryland Convention of 1776.[16]

In all the States amending their constitutions by legislature *ad referendum,* that is, in forty-three Commonwealths, the people are the final arbiters, except in a single instance. This time it is South Carolina that occupies the isolated place, clinging, even in her new Constitution of 1895, to the old Southern system introduced into Alabama in 1819, of bringing the people in, not as the last ratifier, but as a mere adviser after the amendment has once passed the legislature, and before it has yet gone to that body a second time. In such a

[15] The provision relating to this subject in Delaware is as follows: "Any amendment or amendments to this Constitution may be proposed in the senate or house of representatives, and if the same shall be agreed to by two-thirds of all the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the secretary of state shall cause such proposed amendment or amendments to be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published, and if in the General Assembly next after the said election, such proposed amendment or amendments shall upon a yea and nay vote be agreed to by two-thirds of all the members elected to each house, the same shall thereupon become part of this Constitution."—Constitution of 1897, art. xvi, sec. 1.

[16] Cf. Constitution of Maryland, 1776, art. lix.

case, the people are clearly not the enacting power at all; that power still rests with the legislature, which asks for an expression of public opinion, and then heeds the popular instruction or not, as fits its own mood.[17]

In the forty-two States remaining, some interesting tendencies are to be observed and noted. In twenty-seven States it has now come about that it is sufficient if the amendments pass a single legislature before they are voted on by the people. This is following the example of Maine, in 1819, and in this class are included all the new States of the West except North Dakota; *i. e.*, Utah, Idaho, Montana, Wyoming, Washington and South Dakota. There are, therefore, only fifteen States remaining, in which amendments must by varying majorities twice pass the legislature, prior to their submission to popular vote.

Of the first class of twenty-seven States, seventeen require that any proposed amendment shall pass the legislature by a two-thirds vote. These are Alabama, California, Colorado, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, Texas, Utah, Washington, West Virginia and Wyoming. Here again there is room for difference as to the meaning of the two-thirds vote. In most of the States it is clearly stated that this shall be two-thirds "of all the members elected to each of the two houses". In others the phraseology is two-thirds "of all the members of each of the two houses", while in a few, as Alabama, Maine and Mississippi, it is simply two-thirds "of each house", which seems to mean two-thirds of those members present and voting on the subject,—a very different matter. Four States, Arkansas, Minnesota, Missouri and South Dakota, by their present Constitutions, find passage by a simple majority instead of a two-thirds vote sufficient. Here again, the rule is a majority "of the members elected to each of the two houses", though in Minnesota the Constitution calls for a majority "of both houses of the legislature". In six States, Florida, Kentucky, Maryland, Nebraska, North Caro-

[17] See Constitution of South Carolina of 1895, art. xvi, sec. 1.

lina and Ohio, a three-fifths vote of the legislature is necessary to refer amendments to popular vote. Once more there is ambiguity in North Carolina, where the Constitution speaks loosely of three-fifths "of each house of the General Assembly".

Of the second general class, comprising fifteen States, in which proposed amendments must pass two legislatures before going to the people, the greater number of those still adhering to this system, or eleven,—Indiana, Iowa, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Virginia and Wisconsin, find that a majority vote at each passage satisfies every requirement. The very fact of a repetition of the vote being required, is regarded as a sufficient check upon a possible disposition on the legislature's part to "tinker" with the Constitution. In all these States, the Constitutions uniformly provide that the passage shall be by a majority of all the members elected to the two houses.

The remaining four States in this general class do not admit of any grouping. Connecticut retains the same process she led off with in 1818; namely, a vote of "a majority of the house of representatives" of one legislature, and the approval of "two-thirds of each house" in the next General Assembly.[18] Massachusetts, clinging to the method which she introduced in 1821, requires that propositions for amendment must have received a vote "of a majority of the senators, and two-thirds of the members of the house of representatives present and voting thereon" in two successive legislatures.[19] Vermont, in 1870, by an amendment to her old Constitution, by which the system of septennial meetings of the so-called Council of Censors was abolished, brought into our practice another anachronism. There amendments prior to their reference to the people must be approved in the senate "by a vote of two-thirds of its members" and be "concurred in by a majority of the members of the house of

[18] Article xi.

[19] Article ix of the Amendments.

representatives " of one legislature, being then confirmed by " a majority of the representatives of the next following General Assembly ". Moreover, as if to adhere to a tradition in the matter of a periodic system, the legislature in Vermont may only propose amendments at specified intervals of ten years, in 1880, 1890, 1900, etc.[20] Finally Tennessee, reaffirming in her present Constitution, which dates from 1870, an old rule, introduced in the practice of that State in 1834, provides for a vote of " a majority of all the members elected to each of the two houses " of one legislature, and a concurring vote of two-thirds " of all the members elected to each house " of the next General Assembly.[21]

As for the referendum itself in the forty-two, or forty-three States, if we include South Carolina, in the greater number of cases a simple majority of the qualified electors voting on the amendment suffices for ratification, but there are variations in the language of the Constitutions, which have led to great confusion. Judicial opinions have been called out on the subject, but these themselves are conflicting, and the procedure is so diverse that it is scarcely possible to make a classification. Mr. Bryce gave up the task in despair, and other students of the subject will be disposed, too, to think it a labor quite out of proportion to the return. A " majority " in a certain context, may mean a majority of all those who are qualified to vote, including the " stay-at-homes ". Again it may mean a majority of all those voting for certain classes of officers or representatives or magistrates, such as members of the State legislature, and again a majority of those voting on the specific proposition or amendment. There is often a wide difference in these totals, since in the American experience it has been found that greater popular interest is felt and expressed in the success or defeat of individual candidates, than of laws and measures.

There is one notable exception in the case of Rhode Island, where a " majority " in none of its forms prevails since

[20] Article xxv of the Amendments.

[21] Article xi, sec. 3.

propositions for the amendment of the Constitution must receive the approving vote "of three-fifths of the electors of the State present and voting thereon".[22]

Having finished this rather tedious recital as to the actual provisions on the point, some important tendencies may be noted. In the first place, we have been making it easier all the while, to change our State constitutions. To begin with we took the function of constitutional law-making out of the hands of the legislatures, and gave it over to conventions specifically assigned to the task. We gradually perceived that as the States grew and conditions changed, it was essential to introduce some simpler process of amendment than by calling together a new convention every time any change in the constitution, however slight, might be adjudged to be needful. Still entertaining that distrust of the legislature as a constitutional law-giver, which had been characteristic of Americans from the time they severed their political relations with England, we in 1818 in Connecticut brought in the people themselves as a brake upon the legislature in the exercise of the amending power, and from that time onward the legislative mode of amendment with respect to specific and particular amendments rapidly spread throughout the United States. Still earlier we had taken the people into our confidence as direct participants in the enactment of constitutional law, inasmuch as conventions in some States were called only after a favorable vote in a plebiscite; whole constitutions in some States were submitted to the citizens at large, and specific amendments passed by conventions were referred to the people, as they were now also to be referred to the people when proposed by the legislatures. At first there were other checks upon the legislature in the exercise of the constituent power, which are gradually tending to vanish away. It was usual at an earlier time for the constitution to require that a proposition for amendment should twice pass the legislature before being sent to the referendum. Although Maine started out on another track in

[22] Article xiii.

1819, she stood alone in her provision that passage a single time would suffice, until joined by Michigan in 1850, and Ohio in 1851. To-day there are twenty-seven States which employ this simpler process, several, indeed, satisfying themselves if the proposal for amendment shall be passed by a simple majority of the members elected to the legislature, rather than by a two-thirds or a three-fifths majority vote. Furthermore, while it was not unusual some years ago for the constitutions to specify that an amendment should be approved by a larger number of electors than a majority of those voting on the subject, which would again have the effect of making constitutional change more difficult, there has been a tendency in later years toward a liberalization of our standards in reference to this point also. There is a tendency at work to establish the rule that one person over a half of those voting on a proposition, may determine the popular will. A majority of those who present themselves to vote on a subject, define the policy of the State, and speak through it not only for the minority, but for that vast number of men who are so negligent as to political duty, and who feel so little personal interest in public questions, that they remain away from the pollings altogether, and say neither yea nor nay. Democracy, doubtless, is powerless to suggest any other reasonable plan.

It must be noted, too, that our conceptions of constitutional law have all the while been enlarging. Distrust for representatives, particularly those chosen to our legislatures, has increased. The conventions have absorbed important powers in the matter of constitution making, inasmuch as subjects are handled thus now, which earlier would not have had a place in the constitutions at all. Statute law disguised as constitutional law, is put in these comprehensive State codes, to be kept safe away from the discredited legislature. Nevertheless we have been manifesting no distrust of our legislatures, acting in their capacity as makers of the fundamental law, but have been strengthening their hand in this particular. Faith has been put in the referendum as a

power to deliver us from evils arising from the legislature through this source. To-day it is more essential than it ever was before that the constitution should be easily and quickly changed, since a constitution which is full of details concerning nearly every small topic of legislation, must not be bound about by hard and fast barriers, upon which impress can be made only with great difficulty. It is almost impossible, except when public opinion is wrought up in some extraordinary manner to change the Constitution of the Federal Union. Most of us will agree that it is a very fortunate safeguard, a proud feature of our political system which we should hold fast to. Yet in our States political conditions have got to be so abnormal that we are probably compelled to approve of a different tendency. Certainly if we look with favor upon the movement to restrict the power of the legislatures, and enlarge the authority of the constitutional conventions, in order to stop the diabolism that has lately come to flourish at the State capitals, we must have an easy means of changing our codes of law again, if they need change, which they must from time to time, as human conditions undergo amendment. We have at hand no better agent than the legislature; there ought to be none higher or better among those peoples who are bred in the traditions of the British Constitution, but we seem powerless to improve the character of our representatives, and therefore we authorize them to propose changes in the fundamental law, upon the one condition that they will submit them to the people.

That the people are the legislators here to a degree that they are not when they vote upon constitutions submitted *in solido* by conventions, there is abundant evidence to show. It is of diminishing importance to us whether the amendment is passed by the legislature one time or twice, or whether two-thirds of the members or only a majority of the same approve the measure. We look to the people to guard the constitution against unnecessary and improper change, and if they permit such a change, even though their course be against the better judgment of certain elements in the

electorate, we are disposed to accept the result philosophically, with no thought of committing this important duty to any other of the State's agents. The people in the case of constitutional amendments, are in very truth their own law makers, and they have made a record as legislators which we must not judge with too much severity, when it is remembered how necessary it is to have some method of changing the State constitutions, other than by convention, and what singular untrustworthiness has lately been developed in our representative legislatures.

Nearly all the constitutions recognize the importance of the popular vote, when they require that if more amendments than one are submitted at the same election, they shall be numbered or otherwise designated, so that they may be readily distinguished by the voters, and may be accepted or rejected separately. Yet, in some States, there is the lingering suggestion of a tendency to hold the legislature within bounds, in the reference of amendments to popular vote. For instance, in Vermont there are only some certain sessions of the legislature,—once every ten years, in 1880, 1890, etc.,—when amendments to the Constitution may be proposed to the people,[23] and in Tennessee such proposals may be made by the legislature not oftener than once in six years.[24] In some States again, the legislature is restricted in the number of amendments which it may submit at any one time; in Arkansas three, in Kansas three, in Montana three and in Kentucky two. In other States a different method is adopted, as for instance, in Colorado and Illinois, where amendments to more than one article may not be proposed at the same legislative session,[25] and Indiana, where the Assembly, having proposed one or more amendments, must wait until these are definitely disposed of by the people

[23] Article xxv, sec. 1, of the Amendments to the Constitution.

[24] Article xi, sec. 3, of the Constitution.

[25] The Illinois legislature, lately made an effort to extend its powers in this respect by a constitutional amendment, but the latter was rejected by the people to whom it was submitted in 1896.

before it can propose any more. In a few States, too, there are provisions which forbid the legislature from submitting the same amendment or amendments again when they have been once rejected by the people, except after the lapse of a specified period, as for instance, five years. These provisions occur, however, in but a small minority of the States. In the larger number the legislature is given a free hand to do what it will in this field at the time that it will.[26]

It has now come about, therefore, that a very large amount of law reaches us in this manner. The constitutions being themselves stuffed out with extraneous matter which strictly viewed is not constitutional law at all, the amendments, as might be expected, partake of the same character. As we have noted already, one reason why this power must be at the legislature's hand, is because of the radical change which has come over our notions of constitutional law, for since the constitutions are filled with details, meant to serve temporary ends, they must be susceptible to some remodeling, when the conditions which called them forth have passed away again, and they stand out as obstacles in the pathway of a natural political development. This is one explanation of the tendency to much and frequent amendment of constitutions through the legislative mode. Another is the timidity and weakness of the State legislatures, which often knowing not what to do when public opinion, or that which they take to be such, demands the passage of this or the other law, evade the whole issue by incorporating the subject in an amendment to the constitution, and submitting it to popular vote. There are objections which tower up and look rather

[26] When an amendment is submitted to popular vote, the ballots are usually, "For the Constitutional Amendment" or "Against the Constitutional Amendment". The proposition is as a rule summarized and briefly described by title, and when there are several amendments to be voted on at the same time, they are often separately numbered, as a farther means to distinction. In this case, by the Australian ballot system, the vote is by yes or no, the elector's preference being indicated by a cross mark in a space reserved for that purpose. In other cases the full text of the proposed amendments is printed on the ballots. Various methods are in use in the different States.

insurmountable, in thus submitting an ordinary statute law, as I shall show in a subsequent chapter of this work, but the whole matter is taken out of the reach of the courts, when it is embodied in a constitutional amendment. "If the people who are the source of power under our system of government", the members of the legislature argue, "are in favor of this measure for which there seems to be a popular demand, then let them vote for it at the polls. They can decide for themselves whether they want it or not. If they try to hold us responsible at the next election, we will tell them that we did all that ought to be asked of us. We passed a law submitting the question to them, to do with it as they liked." Thus laws to prohibit the manufacture and sale of intoxicating liquors have been submitted in the States again and again, by legislatures whose members have had no feeling of responsibility regarding their action. In a period of ten years, or from 1880 to 1890, some twenty States appear to have had referenda on this subject. This was an era in which the "temperance sentiment" was thought to be assuming formidable political proportions, and the leaders of the parties and the various local "bosses" saw in the referendum an easy and respectable method of holding the support of elements which were threatening to "break away" from the party. The movement reached its height in 1889, when the people of no less than eight States voted on the question, nearly all adversely.[27]

Of this general character, too, are the propositions for granting suffrage to women, for although qualifications for those who are to exercise the franchise, are now quite commonly a subject of constitutional treatment, and perhaps very rightly so, there is here again no intent behind the submission on the part of the submitting power, except to shift the responsibility from its own shoulders. In recent years such amendments have been repeatedly referred to the people, and full suffrage has thus been conferred upon women

[27] Cf. Oberholtzer, *The Referendum in America*, Philada., 1893, pp. 46-47.

in two States—Colorado in 1893 and Idaho in 1896,[28] while school or municipal suffrage has been acquired by women in this way in several Commonwealths. The people of South Dakota in 1897, New Jersey in 1897, Kansas in 1894, California in 1896, Washington in 1898, and several other States, have voted upon this question. In submitting such a proposition, the legislature considers that it neither gives its favor nor withholds it. It assigns to itself indeed a place inferior to that of a legislative committee, which when it reports a subject, is usually able to add its endorsement to it, and render some explanation of its action. This there is no pretense of doing in the case of these prohibitory and woman suffrage amendments. The subjects are not debated, and the votes of the members are recorded perfunctorily without any one asking himself whether he desires that this bill shall become a law or not, or whether in his judgment it is advisable or expedient that it should become a law.

Of a similar character is the famous lottery amendment in Louisiana. This bill was passed by the legislature, and the question was submitted to the people of granting a charter to the so-called "Louisiana Lottery", which was to pay into the public treasury millions of dollars, in aid of the levees, schools, charities and the pension, drainage, and other specific and general funds of the State. The legislature feared to renew the public authorization of this immense enterprise, which, in fact, the Constitution prohibited beyond the year 1895, and the friends of this great instrument of debauchery aimed to secure for it another term of life, by this specious amendment which was in the nature of a bribe to the taxpayers. The people in 1892, when the matter was referred to them, promptly and to their great credit, rejected the insidious proposal.[29]

Nevada, in 1889, held a referendum on a constitutional

[28] Wyoming and Utah have had woman suffrage ever since they entered the Union, the former in 1889 and the latter in 1895.

[29] Cf. McPherson's *Handbook of Politics* for 1890, pp. 266-67.

amendment, meant to put it in the power of the State legislature to establish and incorporate a lottery, the proposal having been defeated by the people, while New Jersey in 1897, when it was a question of prohibiting the legislature from authorizing lottery enterprises, "poolselling", bookmaking or gambling of any kind within the State, also voted on the side of virtue and good order, though the fate of the amendment for a time seemed in doubt, and the majority against the iniquity was so small as to argue little in favor of the people's ability rightly to decide a plain moral question which is thus submitted to them *en masse*. The result of the ballot was 70,443 for, and 69,642 against the amendment, the day having been saved, as it were, by accident.

Somewhat similar in character are amendments in certain Southern States to grant pensions to veterans of the Confederate Army, the legislatures desiring by the submission to free themselves from unpleasant consequences. Such an amendment was submitted to the people of Georgia in 1894, Louisiana in 1896, and Texas in 1898.

Not only in the matter of prohibiting the manufacture and sale of alcoholic beverages, but also in granting licenses for trafficking in liquors, as in Nebraska in 1890, and for introducing a socialistic system of State agencies or liquor dispensaries, as in South Dakota in 1898, the legislature escapes its just responsibility by calling for a popular vote. Such an appeal to the acclaim of the crowd as an amendment proposing to prohibit trusts, monopolies and combinations in trade was made in South Dakota in 1896, and, as if there could be two sides to such a question as the leasing out of State convicts to private companies, the people of Louisiana were asked to express their views upon a constitutional amendment in reference to this point. In Minnesota in 1896, there was a referendum on an amendment proposing a tax on sleeping car and parlor car companies, and in Missouri in the same year, the people were called upon to decide whether the minimum age of attendance among children at the public schools could be properly reduced from

six to five years. The Minnesota legislature in 1888 submitted an amendment to prohibit under penalty, any movement "to monopolize the markets for food products, or to interfere with or restrict the freedom of such markets".

An unusual instance of irresponsibility on the part of legislatures in submitting questions to popular vote, is met with in California in 1893, when it is related that late one night a member in a moment of pique at something which had been said in a Sacramento newspaper regarding the body to which he belonged, got through an amendment to move the State capital to San Jose, a rival city two hundred miles distant. The legislature took this means, it is said, of avenging itself on some ill-humored critics who were rejoicing in print that it was nearly time for the body to adjourn, and for the members to return to their homes.[30]

A proposal to change a well-founded rule of our constitutional system, wrung at great cost from their kings and governors by our Anglo-Saxon ancestors, and now holding a place in nearly all our Bills of Rights, is also occasionally made a subject for popular vote. This is, namely, a proposition to permit less than the whole number of jurors, as for instance five-sixths, to render a verdict. Such an amendment, full of historical interest for the student of legal institutions, was referred to the people of Nebraska in 1896, and although defeated there, has actually secured a foothold in some of the Western Commonwealths. Minnesota adopted such an amendment in 1890. In 1897 the people of Maryland voted on and rejected an amendment, plainly in the interest of good government, to make "appointments in the civil service of the State in the municipalities and counties of the State, according to merit and fitness to be ascertained as far as practicable by examination". Under no possible circumstance should the legislature have been in doubt regarding this subject, and there was nothing to pre-

[30] For this amendment see Statutes of California for 1893, p. 657. It was declared to be void by the Supreme Court of the State, Livermore *v.* Waite, 102 Cal., p. 113

vent its definitive action by the passage of a statute, which would have taken immediate effect without a referendum.

Concerning the actual quantity of this kind of legislation referred to the people each year, some authoritative statistics will be of interest, and these are fortunately at hand in the annual compilations of the New York State Library. In the volume for 1895, record is found of thirty-seven amendments which were submitted to the people in fifteen different States. Nearly all of these were voted on at elections held in the year 1894, and fifteen out of the thirty-seven were rejected by the people, while twenty-two were approved. Classifying these amendments in a general way by subjects, it appears that thirteen related to taxation and debt, either in the States or in local communities, eight to local and municipal government, five to suffrage qualifications, four to the Governor and other State officers excluding the members of the legislature, six to the legislature, three to schools and education, three to the judiciary, two to woman suffrage, while one proposed the removal of a State capital, one the exclusion of aliens from holding real estate, one a granting of aid to soldiers' homes and one the payment of pensions to Confederate veterans.[31] In 1896 the same authority gives us a list of sixty-two amendments that were submitted to the people in that year, of which twenty-four were approved and thirty-eight rejected. Of these again, fourteen related to suffrage and elections, twelve to the judiciary and the courts, eleven to tax and debt subjects, eight to local and municipal government, eight to education, four to legislative procedure, four to the Governor and the executive department of the government, two to corporations, one to prohibition, one to Confederate pensions, two to penal and correctional subjects, one to the removal of a State capital, one to the lease of State forest reserve lands and one proposing compensation for damage to private property.[32] In 1897, however, according to this record,

[31] New York State Library's *Legislative Bulletin* for 1895.
[32] *Ibid.*, for 1896.

only eleven amendments were submitted to the people, four of which were approved and seven rejected,[33] while in 1898 there was again a large number of such propositions referred to popular vote, including seven in California, four in Minnesota, and three in South Dakota. For an earlier period, McPherson's biennial report in 1888 gives us forty amendments for the two preceding years, covered by the compilation, of which twenty-seven were rejected and thirteen were approved.[34] In 1890 there are again forty amendments reported, of which eighteen were adopted and twenty-two rejected,[35] while in 1892, when this record unfortunately closes, there are thirty-six amendments in the compiler's list, of which twenty-three were adopted and thirteen rejected.[36]

One fact claims our attention on the threshold of a further treatment of this subject, and that is with respect to the time of submission. The different States are tending toward uniformity on this point, selecting the even-numbered years, or the years when the "general elections" occur, *i. e.*, the elections for Governors, general State officers and Congressmen. In all but three of the States, Congressmen are now chosen on the same day, namely, the first Tuesday after the first Monday in the November of every second year. There are local elections at other times, and it is still not unusual for amendments to be submitted to the people at special elections, at which no other issues are at hand to divert the interest or attention of the electors. Thus the three amendments referred to popular vote in September, 1897, in New Jersey, were submitted at a special election, as were two amendments in Pennsylvania in June, 1889, including one to prohibit the liquor traffic, three in Texas in August, 1897, fourteen in Nevada in February, 1889, to name but a few of many instances that might be given. The constitutions often contain a definite command that amendments shall only be submitted at general elections, and when this is not the case, the legislature acting on its own authority, usually selects

[33] *Bulletin* for 1897. [34] McPherson's *Handbook of Politics* for 1888.
[35] *Ibid.*, for 1890. [36] *Ibid.*, for 1892.

this time as most suitable for taking the popular vote. On the other hand, there are constitutions which positively require that all amendments shall be submitted at special elections, as in New Jersey, by the Constitution of 1844. In that State when an amendment is proposed, it must be approved by the people "at a special election to be held for that purpose only".[37]

There is a general realization of the fact that it is much more expensive to the State specially to open and equip the polls for an amendment election. Separate ballots must be printed, and the entire machinery necessary for the conduct of elections must be set up just as if a Governor, Congressmen, members of legislature, and an entire list of officers were to be chosen. It is now considered better to vote upon all these subjects on the same day, to print the amendments on one end of the large ballot sheets, since the Australian system has come into use, and to ask for the voter's yea and nay, on propositions at the same time he is choosing from among persons. Again, it has been shown clearly and conclusively by experience, that while it is difficult enough to induce voters to express themselves with respect to laws and propositions at general elections, it is yet harder to get them to take any interest in such a subject at special elections. There is no topic in our practice, so far as it has gone, which calls forth more popular interest, perhaps, than the prohibition of the manufacture and sale of liquor. A large industry is here attacked on the one side, and a personal right to gratify strong tastes and desires is put in jeopardy, while on the other side is the ever active group of teetotalers and prohibitionists. These factors inherent to a democracy are to be reckoned with in any case, quite independent of whatever sentiment there may be which is opposed to, or in favor of a political philosophy justifying drastic State regulation of such a subject, and which would be expected to have some force with those who are entrusted with the duty of making the State's laws.

[37] Art. ix.

In 1889 when two amendments were submitted to the people of Pennsylvania at a special election, one on prohibition, the other on a suffrage question, the total vote cast was 781,261 and 603,694, respectively. Therefore, when there was nothing else to be voted on but these two propositions, upwards of 175,000 persons were interested in the one question who would not put themselves to the trouble to vote upon the other. The total vote of the State at the Presidential election of 1888, was about 1,000,000, and for Governor in 1890, over 900,000. In Connecticut in 1889, the total vote on a prohibition amendment which was submitted singly and separately unaccompanied by any other proposition, was 72,353, as compared with a vote in the State for President in 1888 of 153,978. In New Hampshire in 1889, and Texas in 1887, when prohibition amendments were submitted, together with several other propositions, those upon the prohibition subject received the votes of many thousands of persons who seemed to have no interest in the other matters referred to them. In the latter State, for instance, the prohibition amendment polled 349,897, nearly the full vote, while no one of the other five amendments submitted at the same election secured more than 235,000 votes.[38] In New Jersey in 1890, when two amendments were submitted to the people at a special election, the vote was 62,378 and 62,367 respectively, against 303,741 votes for President in 1888, and in the referendum on the three amendments in 1897, the vote was 140,018, 140,085 and 140,191 respectively, as compared with a total vote of 371,014 for President in 1896.

On the other hand, it is argued by some who seem however to have the weight of our tendencies against them, that at special elections there is a much better opportunity to secure an unbiased expression of public opinion, since parties then are not at a white heat, and men are not absorbed in questions having to do with the success of particular candidates. Indeed the prohibitionists were earlier clear in their

[38] These figures are from McPherson's *Handbook*, and the *World* Almanacs.

demands that their amendments should be submitted at special elections, though, other things being equal, as a means of securing the largest possible number of votes upon a proposition, there is little in our recent experience to recommend such a policy.

At some recent general elections, when amendments have been submitted to the people, instructive comparisons may be made to show how many voters there are who, through ignorance, or indisposition to perform their duties as citizens of a democracy, will omit expressing themselves on either side in a referendum. Of six amendments adopted in Minnesota in 1896 [89] when the total vote varied from 158,027, on an amendment which related to taking private property for public use, to 206,616 on an amendment to tax sleeping car, telegraph, express and other companies, there was a vote for President at the same election of 341,644. An amendment in Minnesota, in 1894, levying a tax on inheritances, secured a total vote of 149,574, when the whole vote for Governor at the same election in the same State, was 296,337. Two amendments which were submitted to popular vote in Kansas in 1890, polled 192,504 and 188,237 votes respectively, as against 294,584 for Governor at the same election. Even in Massachusetts, our leading State of New England, where it is often thought that men look upon citizenship more seriously, two amendments in 1890 received only 141,863 and 127,130 votes respectively, while 285,515 votes were cast for Governor, and in 1891 when two amendments were again referred to the people, 182,278 and 198,485 votes were recorded on the propositions as compared with a total vote of 320,237 for Governor. In Colorado, in 1892, two amendments in reference to taxation were submitted to popular vote. They drew forth 26,054 and 24,173 votes respectively, with a total vote of 93,843 in the State for President at the same election. Three amendments in 1894 in Colorado received about 75,000 votes each, out of a total of 176,966 cast for State officers. At the general election in

[89] General Laws of Minnesota of 1897, pp. iii to ix.

California in 1898, seven amendments polled the following numbers of votes: 144,615, 149,849, 144,927, 137,971, 146,008, 142,438, and 144,464, respectively. A proposition to call a constitutional convention polled only 107,563 votes. The vote for Governor at the same election was 287,064. In South Dakota in 1898, three amendments received 40,299, 42,681 and 42,727 votes respectively, against 74,276 cast for Governor.

Three amendment elections recently held in Texas are instructive. At a special election, August 3, 1897, three amendments, one permitting the formation of irrigation districts in West Texas, the second authorizing certain counties to give aid in the construction of railways, the third validating bonds held by the State as an investment for the permanent school fund, attracted only about 75,000 electors to the polls. Another special election on an amendment was held on November 1, 1898. The legislature had intended to make this submission at the regular general election, but by an oversight, the resolution declared that the election should be held on the first Tuesday in November, instead of the first Tuesday after the first Monday in the month. This was an amendment to authorize the payment of pensions to Confederate soldiers, and the total vote cast was about 110,000. An amendment to increase the salaries of members of the State legislature, submitted a week later at the general election, received a total vote of 291,022.[40] The vote for Governor on the same day was 409,554.[41]

We are thus led to the odd conclusion that while, as is generally understood, there is a considerable body of men in the electorate not valuing the franchise sufficiently to exercise it on any occasion, even in the elections for President of the United States, a contest in which the most interest is always aroused, there is but a fraction equal to about a half of all those who know their own minds respecting candidates who seem to care anything about measures. When the

[40] There were only 35,901 votes for this amendment and 255,121 votes against it. [41] Biennial Report of the Secretary of State of Texas, 1898.

elections are held on special dates, that is, separate from the elections of men who are to represent the people in legislatures and in executive positions, it is impossible to get out even half the vote, unless it be on a proposition to deprive a citizen of his beer and gin. Even a proposal to enfranchise an entire new half of the race, and to double the electorate, or to ally the State openly with lottery men and gamblers, will awaken from their lethargy a relatively small number of those who come out from their homes and places of work and business, to help a Republican or Democratic candidate into the "White House".

In general elections when the electors are at the polls anyhow, and are voting for President, or Governor, or Congressmen, they might, it would seem, without too much trouble to themselves, vote at the same time for or against a proposition that may perhaps be referred to them. Here, too, there is so much unconcern as to the result, that even when the amendment, or other project, is printed on the same ballot with the names of the officers to be voted for, only about five persons out of every ten will indicate what their wishes are on the point. When several proposals are submitted, if there is any way left open to the voter by which he in his illiteracy and carelessness can shirk his duty, he will do so, and many thousands of men who say yea or nay to one or two of the amendments, will often ignore the others altogether.

It is a strange result which has often been remarked upon, not only with us, but in Switzerland also, that when several propositions are voted on at the same time, they will all be treated alike, that is, approved in bulk, or rejected in the same way. The experience in Minnesota in 1898, when four amendments were submitted to the people, is more or less that of the entire country when it appeared, to quote the rather picturesque language of a Western newspaper, "that most of the voters either let the whole batch slide, or voted for all four".[42] We have the case, too, of Texas in August,

[42] All four were adopted.

1887, to which allusion was earlier made, when six separate amendments were referred to the people, one among them being a proposition to prohibit the manufacture, sale or trade in intoxicating liquors. All together were carried down with the prohibitory law, against which there was a very large majority. Perhaps the other five, or four of them at least, would have been quite to the people's mind under other circumstances. In Pennsylvania in 1889, when two amendments were submitted, one to prohibit the liquor traffic and the other to make some harmless and apparently beneficial change in the conditions regulating the exercise of the suffrage, both were voted down by very large majorities. In Louisiana in 1896, when the legislature attempted to amend the Constitution of that State, by the method afterward adopted by the Convention of 1898, practically disfranchising the negroes, the people rejected not only this one amendment affecting the suffrage, but some twenty others as well, without reason or discrimination, and in Nebraska in 1896, the people disposed of ten amendments in the same thorough fashion. In this case the concrete thing at which they were trying to vent their disgust was a proposition of the legislature, that it should itself fix the rates of salaries of the various executive officers of the State, and otherwise enlarge its own powers. The honorarium of these officials hitherto had been definitely limited by the Constitution. In 1898 in California, when seven amendments and a proposition to call a convention were submitted to popular vote, only one amendment, and that a very important measure in reference to the executive department, was saved from the general *débâcle*. The opposition in this case seemed to center about a proposal which the legislature had made to extend the length of its sessions, and to increase the salaries of its members.

In some instances, this tendency produces quite a contrary result. Thus a measure having popularity with the electors, will sometimes exert an influence to help through a proposition to the passage of which the people are indiffer-

ent, or perhaps really hostile. In South Dakota in 1896, when a proposal was made to repeal a "prohibition" clause which had earlier been inserted in the Constitution of the State, three other amendments were carried along, which, though of rather a colorless character, might not have fared so well had it been a question of enacting rather than rescinding the prohibitory liquor law. Some such influence would seem to have been at work, too, in Minnesota, in 1896, when it was proposed to tax the property of sleeping, drawing room and parlor car companies, telegraph and telephone companies, express companies, and insurance companies doing business within the State. The people were so much elated with the idea of getting a revenue out of these corporations, which earlier had seemed to be escaping the tax gatherer, that five other propositions were approved at the same election, though by much smaller majorities.

Nevertheless, it would convey an erroneous impression were we to leave the subject without calling attention to the many cases in which the people can say yes and no at the same breath and really with a knowledge, it would appear, of what those words mean. In November, 1898, three amendments were referred to popular vote in South Dakota, all of first rate importance, one to introduce into the State's political system the Swiss referendum and initiative (23,816 for, and 16,483 against), another to confer suffrage upon women (19,689 for, and 22,983 against), a third to introduce a dispensary system by which the State would take charge of the liquor business (22,170 for and 20,557 against). The returns show therefore that the people accepted two of the amendments, but rejected that one in reference to woman suffffrage.[43] Although only about one-half of the persons voting for candidates at this election chose to vote upon the amendments, of those so doing there is a fair presumption that they recorded their wishes with respect to the different

[43] It is nevertheless suspected that the adoption of the dispensary amendment was an accident. Cf. Session Laws of South Dakota for 1899, p. 73.

subjects submitted to them. The people of California in 1894 voted on ten different amendments, approving of seven and disapproving of three, among the latter being a foolish proposition to move the capital of the State, and a proposition to increase the salaries of the members of the legislature, a project, as I have already noted, for which the people rarely evince any enthusiasm. In a word, not a little evidence is at hand to show that there is method often in what at first sight the casual onlooker might be tempted to call pure madness. This, perhaps, is quite what one should expect, yet the hope might be rightly entertained that the people at all times would manifest interest, judgment and discrimination, else we must conclude that they are not our ideal law-givers. The spasmodic and the half-hearted law-maker, who does what is to be done in a fit, and then reverts to indifference regarding public affairs, can not claim our unqualified admiration. It may, indeed, be necessary as a result of certain natural tendencies in American political life, which have long been at work, to accede to the view that the people are a proper and competent authority, finally to pass upon amendments to their constitutions. But while recognizing the force of historical development, and all that adheres to it, it is certainly a duty to call attention to the fact that in practice, the system is liable to great objections. We are doubtless committed thoroughly to a third body of legislators, that is, the electors themselves, who have been introduced to so large an extent to supplement the work of the representative assemblies, *i. e.*, the legislatures and the conventions. Nevertheless they are not what we would have them be.

In these chapters we have looked a little way into the record of the people as the makers of their own constitutional law as it is submitted to them by the conventions and the legislatures. It is now time to pass on to an examination of the people's powers and qualifications as their own law-makers in respect of other classes of legislation.

CHAPTER VII

THE REFERENDUM ON STATUTES OF GENERAL OPERATION WITHIN THE STATE WHEN THE VOTE OF THE PEOPLE IS AUTHORIZED BY THE STATE CONSTITUTION

We have come now to the legislature's submission of statutory legislation to the people and we are to inquire whether it is necessary for the legislature to embody its bill in the form of a constitutional amendment, if it should desire to escape its full responsibility as a law-giver. The people have constituted the legislature in its field, and the convention in its field, to represent them and to legislate for them; is it competent for either to refer the work back again to the people? There is no particle of doubt that the convention may call upon the electors to approve or reject its proposals, and indeed the American tendencies lead us straightway to the view that a neglect of this submission is a very irregular course, if not one that is fraught with positive peril to the State. From the convention our organic law is derived. That body gives the government basic character and form, creates the legislature and endows it with its authority as an organ in the constitutional system. The legislature thus acts under delegation of authority from the convention; can it again lay its mantle upon other shoulders without some specific direction to do so from the constituent power in the State, which sometimes, of course, is the convention itself, regularly assembled by the legislature, or more often the convention and the whole body of electors, or again, in the case of amendments, the legislature and the electoral body, co-operating? If the law-making power is regularly entrusted to other bodies, for instance to local communities, as is often the case, to the Governor, to judicial officers, to boards and

commissions, all of which have come to exercise legislative authority of more or less importance, we are accustomed to regard it as a strictly legal development, if not, indeed, a scientifically correct development from the point of view of political philosophy. There is no room to doubt then that the makers of the constitution may place the legislative authority of the State in the hands of the people, if this is a change of which they approve. If it is desirable to find a new law-making agency, other than the two houses, or to divide this power among several authorities, the constituent assembly is undoubtedly competent to make these reforms in our system of government. Just as it might clothe some one person or committee of persons with the legislative power in the State, if this government were still "republican" within the meaning of the Federal Constitution, so it may go to the whole people and give them, under such conditions as may seem to be suitable and expedient, the power themselves to enact the law either upon all subjects or upon some prescribed classes of subjects. It is this development which is to be traced in this place and we secure at once a *point d'appui* for the referendum in America, outside of the field of constitutional law.

We come in the first place, therefore, to South Dakota, which in 1898 introduced the referendum on statute laws in a more extended form, and has determined to give the principle a wider application than any other Commonwealth. This change, one of the most important that has ever been made in the American system of government, was accomplished by amending a section of the State Constitution, which is common to the Constitutions of all the States, in effect, if in slightly altered language, and which in South Dakota ran as follows: "The legislative power shall be vested in a legislature which shall consist of a senate and a house of representatives".[1] This clause has now been amended so that while "the legislative power of the State" is still vested in an assembly of two houses, "the people ex-

[1] Constitution of South Dakota of 1889, art. iii, sec. 1.

pressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the State" (the right of initiative and the referendum combined), while, too, the people reserve to themselves the right "to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the State before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the State government and its existing public institutions" (the referendum pure and simple). The people may initiate laws for submission to popular vote upon the petition of five per cent. of the whole number of the "qualified electors of the State". They may require a vote upon any law which has earlier been passed by their representatives in the legislature, with the exceptions noted, upon the request of a similar number of persons. It is interesting to observe that the Governor, with this development, ceases longer to exercise the veto power with respect to such laws as may be initiated by the people upon their own petition. While in the case of a bill which has originated in the legislature, there being no method of knowing whether five per cent. of the electors of the State will later ask for a submission of it or not, the Governor will certainly exercise his prerogative as before. This is manifestly the only course to pursue. If the veto disposes of the bill, the people will need to revive it through their own initiation, should they wish to bring it to popular vote. The amendment specifically confers upon the legislature, the power to make suitable regulations "for carrying into effect the provisions of this section", and the system by this means will soon be developed in greater detail, much to the interest and enlightenment of students of government in the United States.[2]

[2] Session Laws of South Dakota for 1897, p. 88, art. iii, sec. 1, of the Constitution of South Dakota, as amended by vote of the people at the election in November, 1898, reads as follows: "The legislative power of the State shall be vested in a legislature, which shall consist of a

One of the earliest instances of the submission of statutory legislation to popular vote in the States, is met with in connection with the choice of sites for capitals. In new States this is a matter calling forth a great deal of interest among the people, and moreover, it is one likely to stir up the feelings of the representatives' constituents to such a depth that neither convention nor legislature is very eager to decide the question definitively at its own risk. Several conventions have submitted this subject of the location of the seat of State government to popular vote, and it is regarded now as a proper matter for a referendum by the Constitutions of many States. When Texas was annexed, in 1845, the Constitution with which the State entered the Union provided that an election for a capital should be held in 1850 from among the different places considered to be eligible for the enjoyment of this honor and distinction. If any one of the different places voted for should have "a majority of the whole number of votes cast", the seat of government

senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact, and submit to a vote of the electors of the State, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the State before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the State government and its existing public institutions;—provided that not more than five per centum of the qualified electors of the State shall be required to invoke either the initiative or the referendum. This section shall not be construed so as to deprive the legislature or any member thereof, of the right to propose any measure. The veto power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the State shall be: 'Be it enacted by the people of South Dakota.' The legislature shall make suitable provisions for carrying into effect the provisions of this section." Ordinarily laws in South Dakota have run, "Be it enacted by the Legislature of the State of South Dakota", though even with representative legislatures in some States, the phrase has been "Be it enacted by the people of the State of ———" or "The people of the State of ——— enact". Cf. Session Laws of South Dakota for 1899, pp. 121 *et seq.* Laws of Oregon, 1899, p. 1129.

was to be located there. If no one place received so many votes, a second election was to be held between the two highest on the list.[3] Accordingly the legislature, in January, 1850, passed an act, submitting the question to the people, in the manner contemplated by the Constitution.[4]

Oregon by her Constitution of 1857 authorized the legislature "at the first regular session after the adoption of the Constitution", to arrange for a referendum upon the capital question.[5]

The Constitution of Kansas of 1859, the first Constitution of the State, and the one which is still in force, fixed the seat of government temporarily at Topeka. The legislature at its first session, however, was to submit the question of the permanent location of the capital to popular vote.[6]

Denver was selected as the permanent seat of government of Colorado, by a referendum taken in 1881. The Constitution of that State framed in 1876 had authorized the legislature at its first session to submit the subject to the people. As in Texas, if no one place received the necessary majority of the votes cast, choice between the two places which had got the largest number of votes at the first election was to be made at a second polling. Only one election was necessary.[7]

A similar course was pursued in South Dakota in 1889, when that State entered the Union, with respect to the selection of the capital. The legislature was to refer the question to the people at its first session after the admission of the State. This election was held in November, 1890. The question of the choice of a town to serve temporarily as the State capital, had been previously voted on by the people of

[3] Constitution of 1845, art. iii, sec. 35.

[4] Laws of the Third Legislature of the State of Texas, chapter lxvii, p. 77.

[5] Art. xiv, sec. 1.

[6] Constitution of Kansas, art. xv, sec. 8.

[7] Constitution of 1876, art. viii, sec. 2. The vote was taken November 8, 1881, and it resulted as follows:—Denver 30,248, Pueblo 6,047, Colorado Springs 4,790, Canon City 2,788, Salida 695, Scattering 929.

South Dakota in 1889, the proposition having then been submitted by the constitutional convention.[8]

The Constitution of Montana, of 1889, provided for a vote in 1892 on the question of locating the seat of government of that State,[9] and in Washington in 1889, the Convention submitted the same question. If a majority of votes were not cast for any town at the first balloting the legislature was to arrange for a subsequent election on the subject.[10]

Once the seat of government has been located there is risk of course that it may be removed again, and the legislature in several of the States is put under restraint to the extent that it may not pass any law to change a capital site without first submitting the statute to the people for their ratification. For instance, the Pennsylvania Constitution of 1873 declares that, "No law changing the location of the capital of the State shall be valid until the same shall have been submitted to the qualified electors of the Commonwealth at a general election, and ratified and approved by them".[11] Provisions somewhat akin to this occur in the present Constitutions of the following States: California, Colorado, Georgia, Idaho, Minnesota, Mississippi, Montana, Nebraska, Oregon, Washington and Wyoming. California requires that the law proposing the change, before it is submitted to the people, shall be passed by a "two-thirds vote of each house of the legislature", while Georgia requires the same vote as in the case of constitutional amendments, that is "two-thirds of the members elected to each of the two houses". In the other States, regular majority passage, as in the case of ordinary laws, seems to suffice. In Colorado, Montana and Washington, a two-thirds rather than a simple majority vote of the people is necessary to ratify the proposition. In Oregon the legislature is prohibited from submitting such a proposal until twenty years after 1857,

[8] Constitution of 1889, art. xx.
[9] Constitution of 1889, art. x, sec. 2.
[10] Constitution of 1889, art. xiv, sec. 1.
[11] Art. iii, sec. 28.

in Idaho until twenty years after 1889, and in Wyoming until ten years after 1889. It must be understood, of course, that the legislature is still free to propose constitutional amendments to the people on the same subject, and on practically the same terms. This point was made clear in California in 1893, the legislature having submitted a proposition to change the seat of government of the State, in the form of a constitutional amendment, when it could as well have embodied its proposal in a statute. A referendum would have been required in either case.[12] For even when the Constitutions are silent respecting the submission of statutory legislation of this character, the door still stands open for a poll of the people on this subject through a constitutional amendment. In the case when the capital of a State has been definitely fixed by the convention, and is named in the constitution, it is plain that it can only be changed when the constitution is changed. Many of the State Constitutions contain provisions of this character, as for example, in Missouri, where it is declared that "the General Assembly shall have no power to remove the seat of government of this State from the city of Jefferson".[13] The State legislature, quite undeterred, however, desiring recently to take the sense of the people on the question of a removal of the capital to Sedalia, made such a proposal in the form of a constitutional amendment, which was voted on and rejected at a referendum in 1896. It has become as easy in Missouri, and this is true in many other States, for the legislature to pass a constitutional amendment as an ordinary bill.

Of a somewhat similar character are statutes which the legislature is sometimes authorized to submit to the people in reference to the selection of sites for State universities, eleemosynary, correctional and like institutions. This is a subject of only a little less interest to the people than the choice of a spot at which the State capital buildings shall be erected. The rivalry of the towns in the newer States for

[12] Cf. Livermore *v.* Waite, 102 Cal., p. 113.

[13] Constitution of 1875, art. iv, sec. 56.

the honor of possessing these institutions, has often assumed strange and amusing proportions. There is, of course, more than a local pride involved, for State buildings are likely to enhance the value of real estate in the vicinity and to open the way to subsistence and profit to a considerable number of people who perhaps purvey to the institutions, or otherwise directly or indirectly benefit from the distribution of large amounts of public money. In no recent case has the contest for public buildings reached such comical dimensions perhaps as in South Dakota in 1889 and 1890.

The people of Texas in 1881 at the invitation of the legislature, voted upon the question of a choice of site for a State university, a referendum which had been contemplated when the constitution was framed. The Convention of 1876 declared that "the legislature shall, as soon as practicable, establish, organize and provide for the maintenance, support and direction of a university of the first class, to be located by a vote of the people of this State, and styled 'the University of Texas'".[14] The legislature got ready to submit the question in 1881, when somewhat exceeding the strict terms of its authority, three propositions were referred to the people: First, should the medical department and the main university be separated; second, if so, where should the main university be established, and third, where should the medical school be located. The people of the State determined that this "university of the first class" should be of two parts,—the main institution being placed in Austin, the capital of the State, the medical department at Galveston, the leading port and commercial city of the State.[15] Permissive authority was conferred upon the legislature also to "establish and provide for the maintenance of a college or branch university for the instruction of the colored youths of the State, to be located by a vote of the people".[16] This

[14] Art. vii, sec. 10.

[15] General Laws of Texas for 1881, pp. 77-79; McPherson's *Handbook* for 1882, p. 80.

[16] Constitution of 1876, art. vii, sec. 14.

referendum seems not yet to have been taken, though certain lands have been set aside by the legislature which are to accrue to a fund for the endowment of this "branch university" for the colored people.

The Wyoming Convention of 1889, at the same time that it chose a site for the capital, which it was specified the legislature should not remove until after ten years, and then only upon vote of the people, adopted a like rule with respect to the State university, the State insane asylum and the State penitentiary. After ten years, the legislature may move these institutions to new sites, in case the propositions for removal shall be submitted to the people and be approved by "a majority of all votes upon said question cast at such election". Furthermore, the Constitution declares that "the legislature shall not locate any other public institutions except under general laws, and by vote of the people".[17] Under authority derived from this clause of the Constitution, several referenda have been taken in Wyoming, as in 1892, to locate a State institution to be known as the "Home for Friendless Women and Children". The legislature here somewhat exceeded its delegated power in asking the people first to determine the general point as to whether such a home should be established or not. The Constitution contemplated that the legislature would decide this larger question as to the establishment of the institution on its own responsibility.[18] In the same year the people of Wyoming were asked to select a site for a State Hospital for Miners.[19] The legislature declared that at the election "every city, town or village in the State of Wyoming at or within three miles of which shall be employed not less than one thousand miners, shall be eligible as a seat for such hospital". Places were to be nominated just as individual candidates for office are nominated, the "certificates of nomination" being filed with the Secretary of State.[20] The people of Wyoming

[17] Constitution of 1889, art. vii, sec. 23.
[18] Laws of Wyoming for 1890-91, p. 330.
[19] *Ibid.*, p. 352. [20] *Ibid.*

were also consulted in the year 1892 regarding their choice of a place at which to establish a State Agricultural College, some site to be selected from among the various cities, towns and villages of the State, which contained not less than one hundred inhabitants each, and were situated "at an elevation above the sea level of not more than 5500 feet".[21]

As a mark of the distrust which the conventions feel for the State legislatures, we find that an interesting series of restraints are placed upon the latter with respect to the collection and expenditure of public money, the care of State property, and the loaning away of the State's credit. Here again the people have been introduced in many States, as a check upon legislative activity, and statutes upon a large number of subjects of this general class, which we will at once proceed to subdivide, must be ratified by popular vote before they can be of any effect or validity. The Constitutions are distinct in their specifications on this point. There is in the first place that rather numerous body of States which limit the legislature in its power to contract indebtedness on the State's account to a certain definite maximum amount. Under no circumstances, unless it be to repel invasion, suppress insurrection or defend the State in time of war, a contingency not very likely to occur in the present state of our Federal relations, can the legislature pass this limit unless it shall first refer the law creating the liability to a vote of the people, and the latter shall give the proposition a direct sanction. Many of the States were involved in debt by the legislatures, at an earlier period, and their outstanding obligations were in some cases so large that it actually led to repudiation. Several Southern States, and some in the "Middle West", contracted debts and loaned out the public credit beyond their ability or disposition again to make the amounts good. The political financiers of new or poor and sparsely settled parts of the country thus brought scandal upon American statecraft, which it was generally desired

[21] Laws of Wyoming for 1890-91, p. 373.

should be taken out of the field of possible repetition in the future.[22]

The Convention of 1842 in Rhode Island, which seems to have originated this referendum, incorporated a provision in the Constitution of the State in terms as follows: "The General Assembly shall have no power hereafter without the express consent of the people to incur State debts to an amount exceeding $50,000, except in time of war or in case of insurrection or invasion".[23] Michigan followed with an amendment to her Constitution in 1843, which practically divested the legislature of the entire function of debt-making; for "every law authorizing the borrowing of money or the issuing of State stock, whereby a debt shall be created on the credit of the State", unless it should be for the purpose of raising money "for defraying the actual expenses of the legislature, the judicial and State officers, for suppressing insurrection, repelling invasion or defending the State in time of war", was henceforth to be submitted to the people. There was no limit as $50,000 or $100,000, within which the Legislature might exercise a free hand. Every law of this character except for the purposes named in the constitution should, before it took effect, be approved "by a majority of all the votes cast for and against it" at a general election.[24] The New Jersey Convention of 1844 named a limit like Rhode Island, placing the maximum amount, beyond which the legislature might not go, without a referendum, at $100,000.[25] Iowa and New York adopted similar provisions in 1846, and to-day this referendum is established in thirteen states, with varying conditions and limits, which may be briefly set forth as follows:

California, referendum when the debt exceeds	$300,000
Illinois in 1848, " " " "	50,000

[22] An excellent work giving the history of this rather discreditable phase of American public finance is *The Repudiation of State Debts*, by W. A. Scott, Ph.D., New York, 1893. [23] Art. iv, sec. 13.

[24] Amendment to the Constitution of 1835, No. 2.

[25] Constitution of 1844, art. iv, sec. 6.

Illinois	in 1870, refer'm	when	the	debt	exceeds $250,000
Iowa,	"	"	"	"	250,000
Kansas,	"	"	"	"	1,000,000
Kentucky,	"	"	"	"	500,000
Missouri,	"	"	"	"	250,000
Montana,	"	"	"	"	100,000
New Jersey	"	"	"	"	100,000
New York,	"	"	"	"	1,000,000
Rhode Island,	"	"	"	"	50,000
Washington,	"	"	"	"	400,000

Idaho, a referendum when the indebtedness which it is proposed to create exceeds the sum of 1½ per cent. of the assessed value of the taxable property in the State.

Wyoming, a referendum when the debt to be incurred in any year exceeds the revenues for that year.[26]

This limited power to issue bonds and put out State paper is granted to the legislature, it is usually explained, in order "to meet deficits or failures in the revenue", although in Kansas it seems to be for "defraying extraordinary expenses and making public improvements". In nearly all cases it is directly asserted, or the inference is plain, that the limit is meant to apply not to new loans solely, but to all which have gone before and are outstanding in the State's name. No debt or liability is to be incurred which shall "singly or in the aggregate with any existing debt or liability" exceed the sum designated in the constitution unless the law is first submitted to and approved by the people. In Missouri, however, the limit, $250,000, appears to relate to debts incurred in any one year, an important modification of the rule. There is a provision common to most of the constitutions that the restriction shall not apply to debts contracted "to repel invasion, suppress insurrection or defend

[26] In Nebraska by the Constitution of 1866 there was a referendum when the debt was in excess of $50,000. By the present Constitution of the State, adopted in 1875, there is no provision for a popular vote on this subject.

the State in time of war". In nearly all the States it is specified also that at the time the law authorizing the legislature to incur the debt is submitted to popular vote, another law shall accompany it, levying a tax sufficient regularly to pay the interest on the amount, and also the principal within a given number of years, as for instance, eighteen, twenty, thirty or thirty-five. In the usual case the constitutions find a majority of all the votes cast upon the proposal sufficient to pass it, though Illinois prescribes a "majority of the votes cast for members of the General Assembly", and Missouri requires "a two-thirds majority". The referendum as a rule is taken at a general election though in Missouri it must be at an election "held for that purpose", *i. e.*, at a special election.

Instances of such referenda are not at all rare. Recent cases are to be found in New York in 1895, when the people were asked to confer upon the legislature power to issue bonds to the amount of $9,000,000 "for the improvement of the Erie Canal, the Champlain Canal and the Oswego Canal", State waterways which stood in need of extensive repairs;[27] and in California in 1892 when the California legislature invited the electors to assent to a loan of $600,000 for the construction and furnishing of "a general railroad, passenger and ferry depot" in San Francisco,[28] and a loan of $2,528,500 for the purpose of taking up and refunding certain outstanding State issues.[29]

The new Constitution of South Carolina altogether prohibits the legislature from creating "any further debt or obligation, either by the loan of the credit of the State, by guaranty, endorsement or otherwise, except for the ordinary and current business of the State", unless it shall submit the question to the qualified electors of the State, and two-thirds of those voting on the proposition shall approve the law.[30] In many States other kinds of restraints are placed

[27] Banks' *Revised Statutes of New York*, 9th edition, p. 3020.
[28] Statutes of California, 1891, p. 110.
[29] *Ibid.*, p. 210. [30] Constitution of 1895, art. x, sec. 11.

upon the legislatures with respect to the contraction of debt. Some conventions have wholly withdrawn the power from the legislatures; again, definite limits are sometimes prescribed beyond which the legislature cannot go under any circumstances, even with the popular assent; again, loan bills must often be passed by a number of members of the legislature larger than a simple majority, and there are other methods employed by the conventions with a view to making it difficult for the representatives to incur financial obligations, which are likely to occasion trouble and disaster later on. Of course, in all these cases, if the legislature finds such a restriction a serious affair, it may initiate an amendment to the constitution proposing a change in the terms of the restraining provision, and here again there is no one between the existing order and those who would create the debt, but the people themselves.

There are a number of States too in which the conventions have made still more specific reservations regarding the contraction of indebtedness on public account. A deal of the bad financiering by the legislatures has been traceable to subsidies and guarantees granted to internal improvement companies, with a view to conferring benefits on certain communities. Thus, highways, railroads and private development companies of one kind or another have repeatedly profited, while the State has been run seriously into debt. The conviction has taken a firm hold of the people that much of this legislation was enacted to serve private ends, "to put money into circulation" in certain districts, to benefit landholders of one part of the State, while the rest got none of the gain, it having been alleged even that the legislators received large bribes in the way of stock and the like, for attending to matters of this kind. Guarantees in behalf of railroads have often disastrously involved the poorer States. Therefore a series of provisions will be found in the Constitutions specifically limiting the legislature in such appropriations, unless the laws shall first receive the popular assent. North Carolina by a clause which dates

from 1868, requires a referendum when it is a question of lending out the State's credit "in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of the Constitution, or railroads in which the State has a direct pecuniary interest".[31] The North Dakota Constitution puts the legislature under the same restraint in loaning its credit or making donations "in aid of any individual, association or corporation, except for necessary support of the poor"; in subscribing to or becoming the owner of the "capital stock of any association or corporation", or engaging "in any work of internal improvement". There is to be no deviation from these rules, except through the referendum and a ratification of each separate proposal "by a two-thirds vote of the people".[32] A referendum is provided for by the Constitution of Wyoming, when the legislature desires that the State shall embark upon "any work of internal improvement". The law must be approved by a two-thirds vote of the people.[33]

In 1860 the Constitution of Minnesota was so amended that no law "levying a tax or making other provision for the payment of interest or principal of the bonds denominated Minnesota State Railroad Bonds" should take effect unless it were directly voted on and approved by the people of the State. In 1858 an amendment to the Constitution authorized an issue of bonds to the value of $5,000,000 to aid in the construction of certain railways. The companies in some way failed to meet the conditions imposed upon them, and the second amendment was designed to protect the State against the impulsive action of the legislature. From time to time various acts were passed by the legislature, and submitted to the people with a view to adjusting the indebtedness of the State as it was represented by these bonds, first in 1866, then in 1867, 1870 and 1871, some of which plans were objection-

[31] Constitution of 1876, art. v, sec. 5.
[32] Constitution of 1889, art. xii, sec. 185.
[33] Constitution of 1889, art. xvi, sec. 6.

able to the people and others to the bondholders. At last the State Supreme Court in 1881[34] decided that the amendment was unconstitutional, on the ground of its being an impairment of the obligation of contracts, and a settlement was effected by the legislature without again submitting the question to popular vote.

The Constitution of Illinois invested the people of the State with power finally to determine as to the sale or lease of the Illinois and Michigan Canal, a State property.[35] The legislature passed an act in 1882 ceding the canal to the United States, "to be maintained as a national waterway for commercial purposes". The people voted "For the act ceding the Illinois and Michigan Canal to the United States" or "Against the act ceding the Illinois and Michigan Canal to the United States" at the general election of 1882, and the proposition was ratified by the necessary majority of the votes cast.[36]

Another subject is made the matter for a referendum in two States, namely, the appropriation of money for the erection of capitol buildings. The Illinois Convention of 1870 restricted the legislature to an expenditure of $3,500,000 "on account of the new capitol grounds and the construction, completion and furnishing of the state house". If greater outlay were to be made, the laws authorizing the appropriation must be approved by the people of the State.[37] In 1881 a balance of $531,712 was still needed to complete this building. After the law which carried with it an appropriation to cover this sum was twice submitted to the people, in 1882 and 1884, it was finally ratified by them, and the funds were made available to the legislature.[38]

The Constitution of Colorado contemplated a vote of the people upon any proposition to create a State debt "for the

[34] State *v.* Young, 29 Minn., 474.

[35] Constitution of 1870, separate section.

[36] Starr and Curtis' *Annotated Statutes of the State of Illinois*, 2d edition, Vol. I, p. 543.

[37] Art. iv, sec. 33.

[38] Cf. Laws of Illinois, 1881, p. 55; *ibid.*, 1883, p. 39; *ibid.*, 1885, p. 53.

purpose of erecting public buildings " which in any one year should exceed one-half mill on each dollar of valuation of taxable property or which at any one time should make the aggregate amount of such debt more than $50,000. The whole indebtedness incurred on this account could be run up to three mills on each dollar of valuation with the consent of the people of the State, but no higher under any consideration.[39] Such proposals have been repeatedly submitted to the people of Colorado, both as statutes and as amendments to the Constitution. Statutes were submitted in 1883, when bonds to the amount of $300,000, for the erection of the capitol buildings in Denver were sanctioned by a vote of 13,220 against 8.703; in 1889, when a law to create an additional debt of $250,000 for the same purpose was defeated by a vote of 15,010 yeas, and 16,286 nays; in 1891, when authority to issue bonds to the amount of $300,000 was asked for by the legislature, the people again refusing the request by the still more decisive vote of 14,543 yeas and 36,322 nays.[40]

Turning from the State's expenditures, which all these referenda are meant to check, we find that the people have won a direct part in deciding some questions, too, in regard to the State's revenues. Thus the Convention of Colorado in 1876 put an important restriction upon the legislature, when it declared that " the rate of taxation on property for State purposes shall never exceed six mills on each dollar of valuation, and whenever the taxable property within the State shall amount to $100,000,000 the rate shall not exceed four mills on each dollar of valuation, and whenever the taxable property within the State shall amount to $300,000,000, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such

[39] Constitution of 1876, art. xi, secs. 3, 4 and 5.

[40] Mills' *Annotated Statutes* of the State of Colorado, Vol. I, and Supplement, Notes to art. xi, sec. 3, of the Constitution.

qualified electors of the State, as in the year next preceding such election shall have paid a property tax assessed to them within the State, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law ".[41] An act to increase the rate to five mills for the years 1889 and 1890 was rejected by the people in 1888, by a very large majority, the vote standing 762 for, and 10,102 against. The vote for President in Colorado in the same year was upwards of 90,000.[42] The plebiscital feature of this provision was repealed by a constitutional amendment adopted in 1892, which put an absolute limit on the legislature in the following terms: " The rate of taxation on property for State purposes shall never exceed four mills on each dollar of valuation." [43]

Referenda on the same subject which are to be taken under very similar conditions are provided for by the Constitutions of Montana [44] and Idaho,[45] when it is a question of establishing tax rates higher than the limits there definitely named, and the provisions in these two States are still in effect to-day. As compared with Colorado a difference must be noted in that the law proposing the increase in the rate in Montana and Idaho is to be submitted to " the people ", *i. e.*, to all the qualified electors rather than to the property taxpayers alone, a restricted portion of the electoral body.

The Constitution with which Utah entered the Union in 1895, contains a somewhat similar provision. There taxes in excess of five mills on the dollar when the taxable property shall exceed a value of $200,000,000; above four mills on the dollar when it exceeds a value of $300,000,000, must be authorized by direct vote of the property taxpayers of the State.[46]

The people of Minnesota in November, 1896, voted on and

[41] Constitution of Colorado of 1876, art. x, sec. 11.

[42] Laws of Colorado for 1887, p. 29; *Annotated Statutes* of Colorado, 1891, p. 317, note to art. x, sec. 11, of the Constitution.

[43] Mills' *Annotated Statutes*, Supplement, 1896, note to art. x, sec. 11, of the Constitution.

[44] Art. xii, sec. 9. [45] Art. vii, sec. 9. [46] Art. xiii, sec. 7.

adopted two legislative acts,[47] one touching the taxation of certain lands owned by railway companies within the State, a referendum authorized by the Constitution,[48] and another making a transfer of moneys from the " internal improvement land fund ", a proceeding declared by the Constitution to be illegal, except with the direct sanction of the people.[49]

Another question closely bound up with the public credit developed into a subject for a referendum at about the same time that the State legislatures were being put under limit in the contraction of debt. The " soft money " politicians found in State banks an unfailing source of the " wealth " which they believed it was one of the functions of a state to create. By chartering banks, and granting them extended rights of issue, a circulating medium was secured in outlying parts of the Union. Certain public improvements were thus helped forward, only to be followed, of course, by serious collapse later on. This " wild cat " banking through political banks came to claim the attention of the conventions at an early date and in several States, beginning with Iowa, in 1846 the people were introduced as a direct check upon their untrustworthy representatives. The Constitution of Iowa declared that " no act of General Assembly authorizing or creating corporations or associations with banking powers, nor amendments thereto shall take effect, or in any manner be in force until the same shall have been submitted separately to the people at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for or against it at such election ".[50]

A similar provision made its appearance in the Constitutions of Illinois and Wisconsin in 1848, of Michigan in 1850, and Ohio in 1851. This referendum in one or another of its

[47] Laws of Minnesota, 1895, pp. 378, 728; *ibid.*, 1897, pp. x, xi.
[48] Constitution of 1857, sec. 32a, an amendment adopted in 1871.
[49] *Ibid.*, sec. 32b, amendment of 1872.
[50] Constitution of 1846, art. viii, sec. 5.

forms is at present authorized by the Constitutions of seven States:—Illinois, Iowa, Kansas, Michigan, Missouri, Ohio and Wisconsin. The most comprehensive provision in the group is that which occurs in Wisconsin, where there is a double referendum, first to determine in a general way whether a law on this subject shall be drafted and submitted to the people, and then when the law is prepared, whether or not it shall be adopted.[51] Such a method finds its counterpart in the usual course of procedure in the States, when it is a question of changing the constitution. The general proposition is first submitted to the people, and they are asked to decide whether they want a new constitution, and then afterward whether they approve of that particular constitution which has been prepared for them. In some of the States the restriction requiring popular assent has been held to apply only to banks of issue, as in Ohio.[52] In Missouri banks of discount and deposit are expressly excepted from the operations of the provision and the legislature may establish such institutions at will, without seeking the direct authorization of the people. A banking law was submitted to the people of Wisconsin by the legislature of that State in 1852, and was adopted.[53] Amendments to this law have been several times referred to popular vote, as in 1858, 1861, 1862, 1866 and 1867.[54] An act specially providing for the organization of savings banks and savings societies was approved by the people of Wisconsin in 1876.[55] The entire subject was committed to a number of competent authorities on the financial question, and a new banking code, prepared with much care and designed to supersede the earlier law with its amendments was adopted at a referendum in 1898.[56]

In Illinois a banking act was adopted by the people in

[51] Constitution of 1848, art. xi, sec. 5.

[52] Dearborn *v.* Bank, 42 O. S. 617.

[53] Sanborn and Berryman's *Wisconsin Statutes*, 1898, pp. 1525 *et seq.*

[54] *Ibid.* [55] *Ibid.*, p. 1541.

[56] Laws of Wisconsin for 1897, chapter 303, p. 647. The vote was 86,872 for and 92,607 against the law, or a total of 179,479 as compared with a vote of 329,430 for Governor at the same election.

1888, and amended by popular vote in 1890.[57] This law was again amended in 1898.[58] It would be a tedious and perhaps profitless task to follow the course of this referendum in other States.

In a certain number of States, the extension of the suffrage to new classes of citizens, is held to be a matter which the legislatures should not determine, except upon the advice of the people. Those already invested with the privilege of the franchise, shall directly sanction or reject proposals which may be made for an enlargement of the electoral body. Few questions are so important and serious in democracies as those which are bound up with the suffrage. In nearly all the States, this subject has come to be treated in great detail in the constitutions, and little latitude is allowed to the legislatures in giving form to this feature of our political system. If it is desired, therefore, to change the basis upon which the suffrage rests, it is necessary either to refer the subject to the people in the form of a constitutional amendment, or call a convention to revise the constitution, which as we have noted already, is the method in favor in the South, when it is desired to accomplish reactionary and indeed almost revolutionary results, taking us backward on the line of universal suffrage and excluding from further exercise of the privilege many of those persons who have earlier enjoyed it. It is, of course, a very difficult matter to induce any body in the electorate to agree to its own disfranchisement. It is in the extension of the suffrage that the people, *i. e.*, those already enfranchised by the constitution, play an important part in the direct enactment of legislation. Thus the Wisconsin Convention of 1848, after specifying what should constitute the qualifications of electors within

[57] Starr and Curtis' *Annotated Illinois Statutes*, 2d edition, 1896, p. 514.

[58] Laws of Illinois for 1897, p. 184. The amendment was adopted by a popular vote of 124,656 yeas and 55,773 nays, a paltry total of 180,429, as compared with a total vote of 874,115 at the same election for State Treasurer, the leading State officer on the ticket. Illinois at the Presidential election of 1896 polled a total vote of 1,090,869.

that State, declared "that the legislature may at any time extend by law the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election".[59] Under this clause the legislature in 1849 submitted the question of "equal suffrage to colored persons", thus admitting negroes to voting privileges on the same terms as white men.[60] Again in 1885 the legislature submitted an act to confer upon women the right of suffrage in school matters. This proposition came to popular vote, in 1886, and was adopted.[61]

The Convention of Colorado in 1876, had left to the discretion of the legislature of the State the question of bringing forward a measure to enfranchise women. This bill was to become a law if it were approved by the qualified electors of the State (male) at a general election.[62] Very soon after Colorado was admitted to the Union, a woman suffrage act was made the subject of a referendum.[63] The law, however, was rejected by a vote of 6,612 yeas to 14,053 nays.[64] Another law which was submitted by the Colorado legislature in 1893, was more successful.[65] It was accepted by the people, the ballots containing the words "Equal Suffrage Approved" and "Equal Suffrage not Approved".[66]

The Constitution of North Dakota conferred upon the legislature similar authority in the matter of "further extensions of the suffrage to all citizens of mature age and sound mind, not convicted of crime, without regard to

[59] Constitution of 1848, art. iii, sec. 1.

[60] Laws of Wisconsin for 1849, chap. 137, p. 85. The vote was 5,265 for, and 4,075 against the law. Cf. Gillespie *v.* Palmer, 20 Wis. 544.

[61] Laws of Wisconsin for 1885, chap. 211, p. 184.

[62] Constitution of 1876, art. vii, sec. 2.

[63] Laws of Colorado for 1877, p. 648.

[64] Mills' *Annotated Statutes* of Colorado, note to art. vii, sec. 2, of the Constitution. [65] Laws of 1893, p. 256.

[66] The act having been adopted by the people, cannot be repealed by the General Assembly. *In re* Woman Suffrage, Report of Attorney General of Colorado, 1893-4, p. 378.

sex ".[67] But no law of this kind, having for its purpose either the extension or restriction of the right of suffrage, was to have any effect until it was ratified by a majority of the electors of the State.[68] There is no record of the legislature having yet availed itself of the privilege of submitting to the people a law of this character.

In South Dakota the convention provided that the legislature at its first session after the admission of the State into the Union should consult the people upon the proposition of striking the word "male" from the article of the Constitution relating to elections.[69] This question was submitted to the people in 1890, and the proposal was disapproved of.[70] A proposition for the enfranchisement of women was again referred to popular vote in South Dakota, in the form of an amendment to the Constitution, at the general election in 1898, when it was again rejected.

Another matter, which is sometimes left to the treatment of the legislature, acting in conjunction with the people, is that of arranging a scheme of legislative representation or system of apportionment. In Maine by the Constitution of 1820, plans were laid for a membership not to exceed 200 persons in the house of representatives or lower house of the State legislature. When this limit was reached it was the duty of the legislature to take the sense of the people, in order to decide if this number should be increased or diminished. No matter what the result of the vote, an election on the same subject was to be held regularly at the expiration of every ten year period thereafter.[71] A constitutional amendment adopted in 1841, made other arrangements with respect to this subject, and eliminated the referendum, substituting therefor a definite system of apportionment. The Constitution of Virginia of 1850, provided that in 1865 and every tenth year thereafter, if the legislature could not agree

[67] Constitution of 1889, art. v, sec. 122.
[68] *Ibid.* [69] Constitution of 1889, art. vii, sec. 2.
[70] Laws of South Dakota for 1890, p. 117.
[71] Constitution of Maine of 1820, art. iv, part i, sec. 2.

upon a principle of legislative representation, the people at an election to be called for the purpose, should choose from among four proposed systems. The people were to decide whether representation should be arranged on the basis of the number of voters, or of the amount of taxes paid, or of two possible mixtures of these two systems. In case no one system was the choice of a majority of the voters at the first election, a second election was to be arranged for, as between the two systems which had proved to be most in favor at the first polling.[72]

The Convention of West Virginia of 1872, authorized the legislature of that State to submit to the people in 1876, or at any general election in any subsequent year "a plan or scheme of proportional representation in the senate of this State", *i. e.*, a scheme for an apportionment of members on the basis of the number of inhabitants residing in the various districts, according to the system generally employed in organizing the American lower or second chambers.[73]

Occasionally, too, the referendum has found an application when it is a question of changing the boundaries of a State,—in reducing or increasing its area and the extent of its territorial jurisdiction. Thus when the so-called "District of Maine" was to be organized as a separate State, the result was accomplished by way of a plebiscite which was authorized by act of the legislature of Massachusetts, June 19, 1819, of which State, up to that time, the "District" had been a part. The law specified that "if the number of votes for the measure shall exceed the number of votes against it, by fifteen hundred, then and not otherwise, the people of said district shall be deemed to have expressed their consent and agreement that the said district shall become a separate and independent State".[74] The election was

[72] Constitution of Virginia of 1850, art. iv, sec. 5. [73] Art. vi, sec. 50.

[74] *Laws of Massachusetts* passed at the Several Sessions of the General Court, beginning May, 1818, and ending February, 1822, Boston, 1822, chapter clxi, p. 248.

held in the July following, and the necessary majority having been secured, a convention was called to frame a constitution. In this manner Maine was admitted to the Union of States.

The Constitution of West Virginia provides that "additional territory may be admitted into and become part of this State with the consent of the legislature, and a majority of the qualified electors of the State voting on the question".[75]

A referendum of this general class, it may be remarked in passing, was authorized by the Congress of the United States in 1846.[76] The land which had been ceded by the State of Virginia to the Federal government, to be used for the purpose of establishing a national capital in the District of Columbia, was not needed for that purpose. The Virginia legislature declared its willingness to take it back, whereupon Congress agreed to the retrocession contingent upon the assent of the people of the territory involved in the transfer, *i. e.*, Alexandria County. It was distinctly stated in the law that "this act shall not be in force until after the assent of the people of the county and town of Alexandria shall be given to it in the mode hereinafter provided". The vote was to be taken "*viva voce* upon the question of accepting or rejecting the provisions of this act", and in this manner the territory was reattached to the State of Virginia.[77] When the question of the constitutionality of law-making by popular vote afterward came up in the State courts this case was freely cited as a Federal precedent and one entitled, therefore, to unusual consideration and respect.

No one has ever for a moment questioned the full competence of a convention, or the constituent authority in general, to demand that laws on the subjects I have just catalogued in this chapter or indeed on any other subject, shall be passed conditional upon their later acceptance by the

[75] Constitution of 1872, art. vi, sec. 11.

[76] Act of July 9, 1846, *United States Statutes at Large* from 1845 to 1851, p. 35. [77] *Ibid.*

people. Although it must be considered to be in violation of all our tradition and unwritten law on this point, and out of harmony with the whole system of representative government, the convention may undoubtedly introduce such an innovation if it likes. A usual provision in the State constitutions is that "the legislative authority shall be vested in a legislative assembly, which shall consist of a senate and a house of representatives". It is clear that this is the source of the legislature's power, the title to its existence, and the grant of its authority. If all reference to such a body were omitted from the constitution, and the duties earlier entrusted to it were vested in other agents, as in the people, the electors at large, there would be no saving power but, (1), the Federal Government, which, however, would scarcely intervene on the ground that the State government on this account was too democratic, and had therefore ceased to be "republican", or, (2), the agents within the State itself and in the mercy of these we should certainly have to put our faith. All the various organs in this field it was the aim of the Fathers so to arrange that one agent could not develop unduly at the expense of another. The different checks and balances interacting one upon the other in the presence of that indefinite force known as public opinion, must be the safeguard of our American liberties.

It is certain that the constituent power may decree that various classes, and indeed all classes of laws shall be passed subject to the ratification of the people, being only proposed by the legislature as by a committee, and this point having been established I shall next inquire what is the status of a law which is passed by the legislature, and submitted to the people without our being able to point to any clause in the constitution from which the authority for this submission is derived.

May a representative legislature to which power has been delegated to enact laws for the people of the State redelegate its power or shirk its task by referring its work to some

other agent or agents? This brings us to an interesting field of discussion, into which many of our highest American State courts have entered, adding a great deal to the elucidation of the points at issue.

CHAPTER VIII

THE REFERENDUM ON STATUTES OF GENERAL OPERATION WITHIN THE STATE WHEN NO AUTHORIZATION FOR THE VOTE IS CONTAINED IN THE CONSTITUTION

We distinguish in the practice of the States, two classes of conditional laws,—those affecting the people of the entire State, and referred to the whole electoral body of the State, which are being considered in this present connection and those affecting local districts, municipalities and subdivisions of the State, which will be separately treated in ensuing chapters of this work. Laws of the latter class are now generally held to be valid and constitutional, so that they have come to occupy a very important place in the legislative economy of nearly all the American States, but the former class of laws it has been the almost uniform policy of the courts to disallow.

In the first place we have here to clear up the point as to the competence of the legislature to give over its power of legislation to the people with respect to laws which are of a general nature, and apply to the State at large. In the 30's and 40's, the people became profoundly impressed regarding the evils of intemperance, and the aid of the local governments was invoked as a means of regulating the manufacture and sale of intoxicating liquors. The agitation at last took the form of a demand that the business should be prohibited altogether, that wines, spirits, beers, etc., should not be sold at all as a beverage, and only for medicinal purposes under effective restrictions. Violations of the law were to be heavily penalized.

The legislatures in many cases, however, were not willing to go to such lengths on their own responsibility, and intro-

duced the local option system whereby any community, the county being usually regarded as the unit, could prohibit the liquor traffic within its own borders, upon a majority vote of the electors residing in the district. This means of repressing the evil was not thought to be far-reaching enough in some States, as liquor was still being introduced surreptitiously over the frontiers of the county which prohibited the business from neighboring counties which had voted to continue to license inns and public houses. Thus there was developed a demand for State prohibition laws, which were enacted in a number of States, beginning with Maine in 1851, with a measure that soon came to be widely famous as the "Maine Law". It was entitled "An act for the suppression of drinking houses and tippling shops",[1] and it was passed by the legislature as a complete and definitive piece of legislation like any ordinary law. "This act", the legislature declared, "shall take effect from and after its approval by the Governor". Later, however, in 1856, the legislature proposed that the State should return to the license system, but this change of front did not seem to give public satisfaction. Not knowing what policy it ought to pursue regarding the troublesome question, the legislature passed a bill in March 1858, "to ascertain the will of the people concerning the sale of intoxicating liquors".[2] At a special election to be held in June 1858, the people were asked to choose between the "License Law of 1856" and the "Prohibitory Law of 1858", and to make it known which they preferred.

That the people were to make or unmake the law in this case while the legislature simply stood by to propose it, is clearly evidenced by a reading of Section 3 of the act which was as follows: "If it shall appear * * * * that upon a majority of the ballots so returned the words 'License Law of 1856' are written or printed, then the act entitled 'An act for the suppression of drinking houses and tippling shops',

[1] Laws of Maine, 1851, ch. 211, p. 210.
[2] Laws of Maine, 1858, ch. 50, p. 61.

approved March 25, 1858, is hereby repealed, and the act entitled 'An act to restrain and regulate the sale of intoxicating liquors, and to prohibit and suppress drinking houses and tippling shops' approved April 7, 1856, shall thereby be revived." The law of 1858 having been approved in the referendum, it was convenient for the legislature in 1867 again to pass an act for ascertaining the sense of the people with respect to a measure which it had just adopted, increasing the penalties for violations in the hope of making the "prohibition" policy more enforceable. Those in favor of the act were to have the word "yes" printed on their ballots, and those opposed to it the word "no". If a majority of the ballots so returned had the word "yes" printed or written on them, the act would thereby be repealed.[3] In this connection it is to be noted that the laws which were submitted to the people of Maine on these two occasions, were technically perfect acts when they left the hands of the legislature. Nothing was said in the laws themselves regarding their coming into force as the result of a contingency, such as the favorable vote of the people in a referendum. The laws were submitted to the electors afterward, by authority derived from separate and distinct acts, which again were complete within themselves, a point it may be of considerable interest to keep in mind until we come to the consideration of some of the legal questions that have been brought out by the courts, in reviewing legislation of this kind.

Soon after the "Maine law" of 1851 was enacted, and its fame had spread afield, the legislatures of other States were led to follow the interesting, if somewhat radical example of their sister Commonwealth. Prohibitory liquor laws, either with or without the referendum feature, were passed in considerable number and variety. The legislature of Vermont in 1852 enacted a measure of this kind, which was to go into effect in March 1853. In the meantime, however, a vote of the people of the State was to be taken as to "their judg-

[3] Laws of Maine, 1867, ch. 133.

ment and choice in regard to this act " and " if a majority of the ballots shall be ' no ' " then it was not to become effective until December 1853 (instead of in March).[4] Here, again, there was no direct submission of the law to the people. They were technically to determine only one point, the time at which the act should come into force, though it was understood that if they voted " no " the legislature which would be in session again before December, would repeal the law, so that it would be entirely nugatory. In effect it was a submission of the question whether the act should be a law for and during the time intervening from March to December 1853, which is hardly distinguishable from the case of the open reference of the whole subject to the electoral body. The vote was in the affirmative, and the law took effect on the first named of the alternate dates.[5]

A somewhat similar device was employed by the Michigan legislature in 1853. This legislature approached the great constitutional question, however, with all the sail outspread. Its law was an act " prohibiting the manufacture of intoxicating beverages and the traffic therein ". The legislature distinctly declared that " this act shall be submitted to the electors of this State for their approval or disapproval " at a special election to be held in June 1853. However, it was added that " if it shall appear that a majority of the votes [ballots] cast have thereon ' adoption of the law prohibiting the manufacture of intoxicating beverages and the traffic therein, yes ', this act shall become a law of the State from and after the first day of December 1853; but if a majority of the votes cast upon the question have thereon ' adoption of the law, etc. no ', this act shall take effect and become a law of the State from and after the first day of March 1870 ".[6] Here was another odd subterfuge; the law was a positive law to take effect anyhow, no matter whether the people voted yes or no upon it, but in the one case it should

[4] Laws of Vermont, 1852, p. 19.
[5] Cf. State *v.* Parker, 26 Vt. p. 357.
[6] Laws of Michigan, 1853, p. 100.

be in force from and after December 1, 1853, and in the other case, not until March 1, 1870.

The referendum was attacked by a kind of flank movement, too, in Rhode Island in 1853, when it was again a question of vitalizing a prohibitory liquor law. In the Rhode Island act it was provided that "the legal voters in the several towns" of the State at the annual election for State officers in April (the law was passed in January) should vote "upon the question of repealing this act". "In the event of a majority of such ballots being cast in favor of the repeal of this act, the same shall be limited in its operations and have no effect after the tenth day from and after the rising of the General Assembly at its next May session." [7]

The Iowa legislature in 1855, was much more straightforward than any which had yet submitted this question to popular vote. It declared simply and plainly that at an election to be held in April 1855, "the question of prohibiting the sale and manufacture of intoxicating liquors shall be submitted to the legal voters of this State". The ballots should bear the words "For the Prohibitory Liquor Law", or "Against the Prohibitory Liquor Law". If a majority of the votes cast on the subject were for the adoption of the act, it was to take effect on July 1, 1855, otherwise it was to be null and void, the latter however only by implication.[8]

The "Maine Liquor Law" was the subject of referenda in several other states of the Union while the same wave of temperance sentiment was sweeping over the country. Although it has lately been regarded a much better method to incorporate a proposition for the prohibition of the liquor trade in a constitutional amendment, which reaches the people in such a way that the legality of the submission cannot possibly be brought into question, North Carolina furnishes a rather recent instance of a popular vote upon a statute. In 1881 the legislature of that State passed a prohibitory law which was to have "full force and effect" on and after Oc-

[7] Laws of Rhode Island, 1853, p. 232.

[8] Laws of Iowa, 1855, p. 58; Santo *v.* State, 2 Iowa, 165.

tober 1, 1881. In August, 1881, however, the sense of the electors was to be taken upon the question of prohibition. If at this election a majority of the votes cast were "against prohibition", then no person was "to be prosecuted or punished for any violation of this act". Without using plain words, this was nothing less than a positive repeal of the law, if the people should vote against it in the referendum.

It is difficult to draw distinctions, in fact, even if these should be possible by appeals to technicalities of language between such cases of law-making by popular vote, and the actual redelegation of power by the legislature, which all students of our law and institutions declare to be a wholly invalid proceeding.

Another referendum for which no specific authority had been derived from the constitution, was that taken many years ago in California on the question of selecting a "permanent seat of government" for that State. An act passed by the State legislature in 1850 authorized an election upon this subject.[9] The people in this case, however, seem to have been regarded by the legislature merely as an advisory body, whose recommendations were not binding upon it. California's "permanent seat of government" was twice changed within four years in the early days of her career as a State, the first choice having been Vallejo, the second Benicia and the third Sacramento, the present capital.

One of the boldest attempts ever made to introduce the people as an active factor in law-making, a case which soon came to be of standard authority as a model to be well avoided in the future, in view of the unfriendly judicial opinions it immediately evoked, is to be credited to New York. The legislature of that State in March 1849, passed a so-called "Free School Law". The public system of gratuitous schools had just begun to secure a foothold in this country and it was yet a question with the legislature whether the people ought to be taxed for their own education. This law

[9] Laws of California, 1850, p. 412.

provided that "common schools" should be free to all persons between five and twenty-one years of age, residing in the various districts into which the State was divided for purposes of school administration. The law, however, was a mere bill or proposal, since the electors were to determine by ballot at the annual election to be held in November, 1849, "whether this act shall or not become a law". The ballots cast in favor of the adoption of the act were to contain the words: "School—For the New School Law." Those cast against its adoption: "School—Against the New School Law." It was specified, moreover, that the ballots should be folded so as to conceal all the words except the word "School", and "in case a majority of all the votes in the State shall be cast against the New School Law, this act shall be null and void"; but "in case a majority of all the votes in the State shall be cast for the New School Law, then this act shall become a law and shall take effect immediately".[10]

The legislature of New Hampshire submitted to the voters of that State in 1880, a question in regard to minority representation in corporations, a matter it would seem of little general interest to the public. It was proposed that shareholders at elections for directors or managers of corporations should cast "the whole number of votes for one candidate, or distribute them upon two or more candidates, as he may prefer". The law, however, must be referred to the citizens of the State and be approved by a majority of the electors voting upon it, or otherwise it should be "of no effect".[11]

In 1883, in order to feel how the popular pulse beat as to the very disagreeable question of contract labor in the State prisons, the legislature of New York authorized a referendum

[10] Laws of New York, 1849, pp. 192, 561.

[11] Laws of New Hampshire, 1879, p. 365. The vote upon this law was 22,560 for, and 10,375 against, a total of 32,935. The whole vote of the State for President in 1880 was 86,174. Cf. State *v.* Hayes, 61 N. H., 264.

on this subject. The trades unions and other workmen's organizations complained that their labor was being brought into competition with that of the public convicts. This vote was wholly advisory to guide the legislature in its future course. There was presented no law which the people were to accept or reject.[12] The State officers were asked to make a record of the number of votes which had been cast for and against the proposition, and to publish the result for the public information. Of a somewhat similar nature, though intended for the guidance of the Federal rather than the State government, was a vote of the people of Nevada, in 1880, for and against Chinese immigration into the United States. The sense of the electors being made known, the Governor was to memorialize the President and Congress on the subject, in the hope that the referendum would exert an influence upon national legislation.[13]

California furnishes some cases of a similar kind. For a long time much public sentiment, if rather indefinite in strength, has existed in favor of the election of United States Senators by direct vote of the people instead of by the legislatures, as is the method at the present time. In 1892 the people of California were authorized to record their views on this point for the information of the President and Congress.[14] In the same year the California legislature asked for popular advice on a question of State policy, the electors being invited to express their views for or against "an educational qualification requiring every voter to be able to write his name and read any section of the Constitution in the English language".[15]

Likewise in Massachusetts, in 1895, the legislature asked "all persons qualified to vote for school committee" therefore both men and women, to give in their votes at the next State election, "yes" or "no", in answer to the following ques-

[12] Act of May 25, 1883.—Laws of New York for that year.
[13] Laws of Nevada, 1879, p. 27.
[14] Laws of California, 1891, p. 46.
[15] *Ibid.*, p. 115.

tion: "Is it expedient that municipal suffrage be granted to women?" This referendum was quite unofficial, being without binding force upon the legislature, which submitted no law but simply requested the people to express their sense on this subject, presumably for legislative guidance later on.[16] The legislature in 1894, had asked the justices of the Supreme Court of Massachusetts for their opinion as to the constitutionality of the submission of such a law, and although there was some difference in the court, a majority of the judges united in declaring that an act so adopted would be invalid. While this was strictly speaking, not an official deliverance being intended merely for the legislature's information and advice, it is an admirable review of an important constitutional question. The opinion deterred the legislature from passing a conditional act on this subject, and led it instead to adopt the simple plan of taking the sense of the people on a proposition disconnected with any concrete law. There is nothing, it would seem, that could prevent the legislature from resolving to ask the people for advice. It is perhaps, as constitutional for it to do this, as to ask the Supreme Court or an executive officer of the government, or any other department, court or body, for an opinion regarding any subject about which they may be presumed to have useful information.[17]

That there is not a greater number of instances in which the legislatures have submitted general State laws to a vote of the people, and that in those cases at hand, they have gone about the work in so roundabout a way, is due to the hostility which was early encountered in the State courts. As to the constitutionality or unconstitutionality of law-making by popular vote in and for the States, always excepting laws for counties, cities and local districts, there is to-day little difference of opinion. The general prin-

[16] Supplement to the Public Statutes of Massachusetts, 1889-1895, Boston, 1897, p. 1389.

[17] For this opinion of the Massachusetts Justices, see 160 Mass., Supplement, pp. 586 *et seq.*

ciple that a body acting under delegated authority cannot redelegate its powers to some other person or body, is a well-settled point in American law. *Delegata potestas non potest delegari* is a rule the virtue of which no one disputes. "Where the sovereign power of the State has located the authority there it must remain," says Judge Cooley, "and by the constitutional agency alone, the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust." [18] The American courts have again and again reiterated this principle, and even where they have admitted that there might be exceptions to the general rule, as in the case of local communities, the truth of the fundamental doctrine has never been seriously questioned by any one.[19]

[18] Cooley, *Constitutional Limitations*, p. 137; cf. also the opinion of the Justices of the Supreme Court of Massachusetts, 160 Mass., Supplement.

[19] The first important case bearing upon this subject in any State came to a decision of the Supreme Court of Delaware in 1847, Rice *v.* Foster, 4 Harr. 479, on a local option liquor law, which was declared to be unconstitutional. Other leading cases are the following: Parker *v.* Commonwealth, 6 Barr (Penn.) 507; Barto *v.* Himrod, 4 Seld. (N. Y.) 483; Thorne *v.* Cramer, 15 Barb. (N. Y.) 112; C. W. & Z. R. R. Co. *v.* Clinton County, 1 O. S. 77; Boyd *v.* Bryant, 35 Ark. 69; Upham *v.* Supervisors of Sutter County, 8 Cal. 379; Ex-Parte Wall, 48 Cal. 279; State *v.* Wilcox, 42 Conn. 364; Maize *v.* The State, 4 Ind. 342; Santo *v.* State, 2 Iowa, 165; Geebrick *v.* State, 5 Iowa, 491; State *v.* Weir, 33 Iowa, 134; Commonwealth *v.* Weller, 14 Bush. (Ky.) 218; Fell *v.* State, 42 Md. 71; People *v.* Collins, 3 Mich. 343; Alcorn *v.* Hamer, 38 Miss. 652; State *v.* Hayes, 61 N. H. 264; City of Paterson *v.* Society for Establishing Useful Manufactures. 4 Zab. (N. J.) 385; Morgan *v.* Monmouth Plank Road Co., 2 Dutch. (N. J.) 99; Bank of Chenango *v.* Brown, 26 N. Y. 467; Gordon *v.* State, 46 O. S. 607; State *v.* Swisher, 17 Texas, 441. These cases are arranged chronologically and by States in Oberholtzer, *The Referendum in America*, 1893, and may there be conveniently referred to.

In six States only have the higher courts given in their opinions on the direct question of the validity of law-making by popular vote, in respect of measures which apply to the whole State. First and foremost is the opinion called out by the New York Free School Law of 1849, which was, as has been observed already, a mere *projet de loi,* since the electors were to "determine by ballot at an election to be held in November next whether this act shall or not become a law". The constitutionality of the law was made the text of opinions by the Supreme Court in three separate judicial districts before it reached the Court of Appeals.[20] In two of these districts, all the judges concurring and with full benches, the law was declared to be unconstitutional, and of no effect since it was only the draft of an act referred by a body, whose constitutional function it was to pass it definitively itself, to another body which was unknown to the constitution as a law-giver. In the other district where a different conclusion was arrived at, there was not a full bench, and there was a dissenting opinion.[21] The New York Court of Appeals to which the law came in 1853, delivered a notable opinion [22] on this subject, establishing a line of argument which has become classic in the theory and practice of the United States. Chief Justice Ruggles in the majority opinion said:

"The exercise of this power by the people is not expressly and in terms prohibited by the Constitution; but it is forbidden by necessary and unavoidable implication. The senate and assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power. The people reserved no part of it to themselves excepting in regard to laws creating public debt, and can therefore exercise it in no other case. * * * The legislature had no power to make such submission, nor had the people the power to

[20] In the seventh district, Johnson *v.* Rich, 9 Barb. 680; in the second district Thorne *v.* Cramer, 15 Barb. 112, and in the fifth district Bradley *v.* Baxter, 15 Barb. 122.

[21] Johnson *v.* Rich, 9 Barb. 680.

[22] Barto *v.* Himrod, 4 Seld. ((N. Y.) 483.

bind each other by acting upon it. They voluntarily surrendered that power when they adopted the Constitution. The government of the State is democratic; but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature."

The theory was early developed that a representative lawmaking body could pass a law whose going into effect was made conditional upon the happening of a future contingent event, which might perhaps be the vote of a majority of the electors in its favor. Such legislation was pointed to both in the Federal and State practice, and it has since become quite common, especially with respect to municipalities and local communities in which connection it will receive fuller consideration in another part of this work. It is not questioned that a legislature may pass laws for local districts whose going into effect depends upon a contingency, which contingency is frequently a majority vote of the people in favor of the act. This theory was developed in Massachusetts as early as in 1826.[23] But the question here is this,—can the referendum on laws covering the entire State seek and find the same defense? There is no support for this view in Barto *v.* Himrod, for in this opinion the New York Court of Appeals said: "The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the Constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised. They have no more authority to refer such a question to the whole people than to an individual. The people are sovereign, but their sovereignty must be exercised in the mode which they have pointed out in the Constitution."

[23] Wales *v.* Belcher, 3 Pick. 508.

Justice Willard in a separate opinion on the same case, in concluding his argument, forcibly said: "If this mode of legislation is permitted, and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of law-givers, and with just wisdom enough to devise subtile schemes of imposture to mislead the people. All the checks against improvident legislation will be swept away, and the character of the Constitution will be radically changed."

In Iowa, in respect of the prohibitory law which was submitted to the people in 1855, the court took up a similar position. The highest judicial tribunal of that State in its opinion respecting this act said: "The General Assembly cannot legally submit to the people the proposition whether an act should become a law or not; and the people have no power in their primary or individual capacity to make laws. They do this by representatives. There is no doubt of the authority of the legislature to pass an act to take effect upon a contingency. But what is a contingency in this sense and connection? It is some event independent of the will of the law-making power as exercised in making the law or some event over which the legislature has no control. * * * The will of the lawmaker is not a contingency in relation to himself. * * * After a bill has passed the two houses and received the approval of the Governor, and thus becomes a law by the constitution, how could a vote of the people affect it? As well might this court submit the decision of these causes to a vote of the people of the State, or of a judicial district, or the Governor his pardoning power." [24]

[24] Santo *v.* State, 2 Iowa, 165. It is interesting to note in this connection that the court, although declaring the referendum which was provided for in the law, to have been unconstitutional, upheld the constitutionality of the law itself. The judges said it was a complete law, and having been regularly passed by the legislature, and signed by the Governor, they could regard as invalid only that part of it providing for a vote of the people. The question was not referred to popular vote as

The singular method of securing a vote of the people on the prohibitory liquor law of Rhode Island, namely by a referendum to decide whether or not an act which was complete when it came from the hands of the legislature should be repealed, also led to a judicial opinion. The court here said that the Constitution of the State had vested " in the General Assembly alone composed of the two houses, the power of enacting laws ", and the Assembly could not " call to their aid any other body making the existence of a law depend in whole or in part upon the will of such other body." They held, however, that this law could not be objected to on such a ground for the vote was not for or against the enactment, but for or against the repeal of the law, and the referendum was to have no effect unless it should be favorable to repeal. The citizens voted against the repeal of the act, and the court were of opinion therefore that they were not called upon to take a hand in the matter, though the inference was plain that an adverse decision could have been expected in any other case.[25]

In Michigan on the question of the constitutionality of the referendum upon a prohibitory liquor law, to determine whether the act should take effect in 1853, or not until 1870, the court was equally divided. All the judges concurred in the proposition that the power of enacting general State laws could not be delegated by the representative body, even to the people themselves. One opinion, however, went out from the view that the favorable vote of the people could be the happening of a future event which was a contingency such as might rightly be named by the legislature. The act was complete when it left the hands of the legislature. The people were simply to decide when it should go into effect. It was a positive law in any case, for the only question to be determined was whether it should come into force on December

in the case of the New York Free School Law " whether this act shall or not become a law ", in which event the Iowa court lead us to infer that they would have held the whole act to be unconstitutional.

[25] Brown *v.* Copeland, 3 R. I. 33.

1, 1853, or March 1, 1870. The other opinion was a vigorous denial that the vote of the people which was required by the law could be regarded as a contingency in any proper sense. Laws to take effect upon the happening of a future event must be complete and positive in themselves, when they passed from the hands of the legislature. It was not permissible that they should become laws at the will of some "foreign or extraneous power", which has been asked to determine as regards the expediency of the law itself. Such a determination as to the expediency of the legislature's course, the judges in their opinion said, had here been contemplated, and the act therefore, must be held to be unconstitutional. "This act of the legislature," the leading opinion adverse to the law continued, was "a most flagrant violation of the Constitution, and of our representative system of government" in whose stead now it was proposed that "a collective democracy, the most uncertain and dangerous of all governments" should be "arbitrarily substituted".[26]

In Vermont's prohibitory liquor law of 1852, like Michigan's, the point submitted to the people was the date upon which the law should become operative. The Supreme Court declared in this case that the form of the law was such that its coming into force did not depend upon the vote of the people. An adverse vote could have only suspended the operation of the law for a few months. It was a positive act with or without the referendum. This court, however, went much farther than any of the other tribunals. They declared that a favorable vote of the people was a good and sufficient contingency for the going into effect of general State laws, as well as laws affecting local districts. No distinction was drawn between laws for the whole State and laws for the localities. There had been such legislation in free states, the court said, for hundreds of years, and as for its being void and irregular, the opinion continued, it was a singular fact that

[26] People *v.* Collins, 3 Mich. 343.

"the remarkable discovery should first be made in the free representative democracies of America * * * where the legislators are confessedly the mere agents and instruments of the people, to express their sovereign and superior will to save the necessity of assembling the people in mass", etc.[27] This very democratic opinion is probably without its counterpart among all the decisions in the American courts on the subject of the referendum. In its disregard of the legal barriers which the "Fathers" established in this country to save the people from the rule of the crowd, it must be held to rank as a very unusual state paper and one laden with very dangerous sentiments.

A recent judicial opinion in reference to conditional legislation of this kind, was delivered in New Hampshire in 1881, the law of 1879 allowing minority representation in the boards of directors of corporations having come to the court for review. Here the judges drew a very plain distinction between the State and the localities. All our experience, and considerations of policy as well, tend to vindicate the theory that the contingency of a favorable vote of the people may be the occasion of the taking effect of a law which the State legislature has passed to apply to a county, town or other local district. "In the organization of State government," however, said the court in the New Hampshire opinion, "for reasons by them deemed sufficient, the people vested the supreme legislative power not in themselves, but in certain agents as a personal trust. * * * They were of opinion that while there might be good reason for granting to municipalities a limited power of making local law, it was not wise to attempt to carry on the work of State legislation in town meeting. They might have made an effort to overcome one of the difficulties of that method by authorizing a State committee to propose laws, and requiring the Governor to ascertain and proclaim the result of the popular vote in the manner adopted by the act of 1879 They preferred and they

[27] State *v.* Parker, 26 Vt. 357.

established a representative republic; and they did not confer upon the legislature the power of abolishing it, repealing the second article of the Constitution and changing the supreme law-making body into a committee on proposals. That power the legislature would have if they could transfer from themselves to others the responsibility of passing or refusing to pass a law of a non-local character. If the power of general legislation could be conveyed by the act of 1879, to those who might be induced to exercise it in town meeting, all laws could be made and repealed in the same way, and the representative character of the government could easily be extinguished." [28]

Thus in but one State, Vermont, do we find a higher court that has made a declaration in favor of the system of submitting general State laws to popular vote, when the legislature is unable to point to a clause in the constitution which specifically authorizes the submission. In Michigan the court was equally divided on the point. The other decisions are against the proceeding. In both Vermont and Michigan, the issue was not quite direct, because of the technicalities which the legislatures had purposely raised to avoid such a result as that one earlier recorded in New York, in reference to the Free School Law. The people were to determine, not whether the bill should become a law, but the mere point of time when it should become effective. The law when it left the legislature, was a positive law in any case; the people were to decide but this single question: whether it should come into force at once, or at some future time, as for instance, nearly twenty years hence, which was the alternate date in Michigan.

Nevertheless these decisions seem to have availed the referendum very little either in Vermont or Michigan. Justice Pratt, in his opinion against the constitutionality of the Michigan law in 1854, alluding to the unfortunate division in the court, and filled with alarm for the future, said: "This

[28] State *v.* Hayes, 61 N. H. 264.

sovereign law of our constitutional system of government [the Constitution] says that the legislature shall make the laws for the State; that this and this only is its legitimate business as a distinct branch of the government. But the members of this constitutional body meet and say we will not be governed by the expressed will of the sovereign. * * * A majority of the electors sanction such an unauthorized proceeding. * * * The question is taken to the court of last resort, whose duty it is under the Constitution, to determine the question, but the members of that court are unable to agree, being equally divided, so that no affirmative decision upon it can now be made. In view of such a state of things, what is to be the final result and end of this kind of legislation? Our boasted system of representative government is to be perverted, and a collective democracy the most uncertain and dangerous of all governments to be arbitrarily substituted in its stead." [29] Even in Vermont where the court was so well convinced that the people could be introduced into the system at the legislature's will to accept or reject State laws, the referendum has not enjoyed any marked development.

The unconstitutionality of laws of this character is a general principle so firmly established throughout the Union to-day, that the legislature prefers not to run the risk of submitting its acts to popular vote. In the case of prohibitory liquor laws, and other legislative questions of a vexatious character, it is a much more feasible plan, as I have noted on earlier pages, to embody the proposal in an amendment to the State constitution. With the liberalization of our ideas in regard to constitutional law, and the simplification of the process by which amendments may be submitted to popular vote, there is little reason now why the legislature should pursue a course that may bring down upon itself the charge of having misunderstood and violated the charter from which it derives its whole authority.

[29] People *v.* Collins, 3 Mich. 368.

CHAPTER IX

THE LOCAL REFERENDUM—BILLS AFFECTING THE SCOPE AND FORM OF THE LOCAL GOVERNMENTS

It is in the counties, cities, towns and the other local districts of the States, by whatever name they may be designated, that the referendum has reached the fullest measure of its development in America. In no other field is it so laborious for the student to assemble the facts, since the laws governing the localities make very large volumes in every State, and they are being changed at each legislative session. Rules of a general character are observed in each State, however, in the enactment of such legislation, and all the Constitutions have more or less to say for the guidance of the legislatures. Indeed, in many States, and it is a tendency which has become firmly established in our practice, special legislation in regard to localities is being prohibited altogether, or the privilege of passing "special laws" is at any rate being very much curtailed. This again is an important restriction upon the powers of the legislature, which, as we have seen, has been losing on so many sides, and fewer legislative sessions, shorter sessions and smaller volumes of laws are the most natural and not unwelcome result. The great numbers of private acts which earlier burdened the statute books, and which had reference to separate municipalities,—cities, counties, towns, townships, etc.,—meant to serve a purpose in single emergencies, have been superseded by "general laws" in most of the States. It is true that there are some important Commonwealths in which "special laws" are still permitted by the Constitution, but the evils which have crept into the legislative halls through this system, especially with the growth and development of great cities, have become so of-

fensive that the tendency against such legislation is very marked, even where it is not made entirely impossible by a constitutional prohibition. The lobbying, log-rolling, "jamming" and other abuses of even a worse character have come up in the train of the "special law", and this kind of legislation has been made a mark therefore for the conventions which in many ways in recent years have done so much to give new form to the State governments.

The "general law" is a law which is passed by the legislature to apply to all the cities, counties or other local districts of the State, or to certain classes or groups of cities, counties or districts. By this means it becomes very much more difficult for the legislature to pass a law for a single city or other locality, and it would be impossible for it to do so were it always acting in good faith, obedient to the spirit as well as the letter of the constitution. Some of the devices which are employed to evade this constitutional restriction are very clever, and at the same time very amusing. It is usual for the legislatures when they pass their general laws, to divide the counties and cities into a number of "classes". This course seems to be quite essential, especially in the case of cities, since these unwieldy giants which have come up to confuse and make more difficult the problems of State administration often have enormous populations. A very large percentage of the whole population of a State may be urban, and in all likelihood one or two cities will have got such a start over rivals in the State, that they will contain as many as a third or fourth part of the inhabitants of the whole Commonwealth. A city of 1,000,000 inhabitants cannot be governed by the same organic law as a city of 100,000, and the latter will have needs differing in a material way from those of a municipality which has a population of only 10,000. The State legislature therefore creates "classes", and it not infrequently happens that there is but a single city in a class. For instance, in Pennsylvania, cities, for purposes of government, are divided into three classes: the first made up of cities containing a population of 600,000 or more, the second,

of cities below 600,000, but not less than 100,000 inhabitants, the third, of cities having less than 100,000 inhabitants. Now it so happens that Philadelphia is the only city in the State of the first class, and until a rather recent time Pittsburg was the only city of the second class, so that while ostensibly engaged in passing a general law, the legislature though not naming them, could unrestrainedly legislate for Philadelphia and Pittsburg, through laws applying to "all cities of the first class", and "all cities of the second class".[1] This arrangement of classes has been held to be within the meaning and intent of the Constitution by the highest court in the State.[2] Acts dividing the cities of the State into five and seven classes respectively were, however, declared to be unconstitutional, in that it was carrying the classification too far, thus recognizing a "vicious principle" which ought to be "unhesitatingly condemned".[3]

This "vicious principle", however, has not always been "condemned" in other States. The number of classes has by no means been confined to three, even where the constitutional restraints seem quite as rigid as in Pennsylvania, and the intent to evade the constitutional limitation on the part of the legislature quite as deserving of the courts' disapprobation. For instance, Missouri recognizes four classes of cities, California six, and Ohio no less than seven, and below these villages and hamlets.[4] In California the counties of the State are divided by the legislature into no less than fifty-three classes.[5] There are only fifty-seven counties in the entire State. More than one county could scarcely find membership in the 46th class, for instance, which includes all counties having a population over 4,930, and under 4,980, or in the 33d class of counties having a population in excess of 10,030, and less than 10,070, or in the 49th class containing

[1] Pepper & Lewis, *Digest of Pennsylvania Laws*, Vol. I, p. 555.
[2] Wheeler *v.* Philadelphia, 77 Pa. 34.
[3] Ayars Appeal, 122 Pa. 266.
[4] Giauque's *Revised Statutes of Ohio*, 7th edition, sec. 1546.
[5] Statutes and Amendments to the Codes of California, 1893, p. 384.

over 3,700 and under 3,780 inhabitants. In Ohio also a number of laws pretending to be general have been passed, in which trivial differences of population furnish the basis for the classification, as for example, a law of March 29, 1879, which was to apply to all counties having a population at the Federal census next preceding the passage of the act, of not less than 29,130, nor more than 29,135; and another of May 14, 1894, containing a reference to all counties having a population of not less than 31,940 nor more than 31,960, and not less than 35,400 nor more than 35,500. There is sometimes even greater definiteness in the act: *e. g.*, a direction to the commissioners of "any county in Ohio containing a population by the last census of 49,974".[6] Again a law of 1895 in Tennessee was made to apply to counties of not less than 30,000 nor more than 34,000 inhabitants, to those of a population of 55,000 and over, and to such adjoining counties as might have inhabitants numbering 35,100 or over.[7] Such ingenious attempts to enact special laws despite constitutional prohibitions have several times reached the courts, and have called forth unfavorable opinions from the judiciary.[8]

Again efforts have been made to introduce geographical distinctions in making up the classes, as in Pennsylvania, where a few years ago a law was passed to apply to "all counties in this Commonwealth where there is a population of more than 60,000 inhabitants, and in which there shall be any city incorporated at the time of the passage of this act with a population exceeding 8,000 inhabitants, situate at a distance from the county seat of more than twenty-seven miles by the usually travelled public road".[9] This covert designation of Crawford County and the city of Titusville, the Pennsylvania Supreme Court likewise declared to be an unconstitutional device and the judges offered the interesting opinion that

[6] Giauque, *op. cit.*, sec. 2107-7.

[7] Acts of Tennessee, 1895, pp. 380-81.

[8] See 21 O. S., 1; 36 O. S., 481; 53 O. S., 94; 54 O. S., 470; 96 Tenn., 696.

[9] Act of Apr. 18, 1878, Pennsylvania Laws, p. 29.

there could be no proper classification of cities or counties, except upon the basis of population.[10]

In addition to the important restriction upon the power of the legislatures, which is conveyed in this prohibition of special legislation, there are other prohibitions materially limiting these bodies in this field of their activity, with respect to local communities. The conventions, in their desire to safeguard local interests, and insure local governments against too much legislative interference have conferred upon the counties, cities, etc., a considerable amount of authority, which they are to exercise directly and independently. The agencies of local government within the State therefore act under the Constitution, to a certain degree without the mediation of the legislature. They can point to the Constitution as the charter from which their powers are directly derived. In those respects, therefore, in which the conventions have laid down definite rules for the local districts, the legislature can act only in a supplementary way. It can still legislate, if not forbidden to do so, but only in filling out the framework which has been set up by the convention, and in passing laws which are necessary to a proper carrying out of the convention's will.

In several States indeed there are tendencies at work to free the localities almost altogether from the legislature's authority, and to make them separate and self-governing, to a degree never before suggested or contemplated. In four States such a result has been arrived at, with respect to cities, in that they may frame their own charters,—namely, Missouri, California, Washington and Minnesota. They are thus created almost independent Commonwealths within the Commonwealth, so to speak, subject, of course, to the general supervision of the State in administrative and judicial matters. The city is empowered to elect its own "Board of Freeholders", which acts like a constitutional convention. It frames a charter, submits it to the people of the city, and the

[10] Commonwealth *v.* Patton, 88 Pa. 258.

legislature's influence over the city's affairs, by this means, is confined within very narrow bounds. It was even proposed in California a few years ago to extend a similar privilege to counties, thus introducing a new principle into another important field of local government. There is risk to-day, indeed, in view of recent developments in several States of losing sight of the fundamental fact that the municipal and local governments have stood, and in the nature of the case, must certainly continue to stand in very close relation to the State legislature.

The system of local administration in this country, rural and urban, is a very difficult one for any but the careful student clearly to understand. There are different methods of dividing and subdividing the burden and the responsibility of local management in the different States. There are different units, some larger and some smaller, the result of an historical development. Some bear one name and some another, though systematization, taking the Union as a whole, is not at all impossible. Our whole scheme of local government rests on the idea that by an administration of affairs in local districts, through officers locally chosen, public functions can be exercised to better advantage, and with more hope of the people's acquiescing in the result, than if all power emanated from some distant central authority.[11] The power of the law-making agents of the State, the convention and the legislature, over these municipal corporations and local districts is very great, both theoretically and in actual fact. They are "derivative creations" of the State.[12] There is no limitation upon the power of the legislature in respect of these corporations, except as it is found in the Federal or State Constitutions, though to the latter, as I have already indicated, a considerable number of restraints can now be traced. The legislature in the natural course of things, not only creates, but it can also alter or abolish the local government, except of course and always as it is limited in the exer-

[11] Dillon, *Municipal Corporations*, 4th ed., 1890, Vol. I, p. 29.
[12] *Ibid.*, p. 55.

cise of its prerogative by the constitution. But as a result of different influences, chief of them being the convention, the local governmental districts are plainly gaining larger liberties. To an extent that was scarcely intended even by those who framed our very liberal system of local government, the communities are coming to be more free from the State capitals, and especially from the State legislatures. Gradually political power and influence are being more and more distributed. In other words, we are living in the presence of a movement whose leading characteristic is greater political decentralization. The convention looking about for agents it could trust, has given greater powers to these local corporations, and thus has pressed in upon the legislature from still another side.

While we before had in this country what we named local self-government, in distinction to some forms abroad which have been evolved as a part of a highly centralized system, we seem to be extending this idea, enlarging our notions in this regard, and making the corporations freer still. Especially marked is the tendency to emancipate large cities from the legislatures as the result of a movement toward what has been popularly called "Home Rule", and we have the remarkable manifestation, therefore, of municipalities governing themselves, not under charters granted them by the legislatures, but framed by committees of their own citizens, and adopted by their own citizens by plebiscite, under authority derived from a rival law-making body, the constitutional convention.

There are in this country, as Mr. Bryce has so clearly explained, three general systems of local government. He has called these the town system, the county system and the mixed system, the latter being one in which neither the town, nor the county is of preponderating influence, though both units are at hand. In New England, the town, of course, forms the basis for all local government, and although there are counties also, these are only loose aggregations of towns. It is in the latter that political interest centers, and they can trace their

history back to a time when a central colonial or State government had not yet been developed. The primary assembly of citizens still meets in each town to legislate upon questions of common importance. In the South, as a development from the plantation system, the county, called in Louisiana the parish, is the predominating unit in local government, while in the central belt of States, the county and town or township, which exist side by side, are contending for the mastery so hotly, that it is difficult to say whether the larger or the smaller area will gain the victory. In those parts of the West where settlers from New England have established themselves, they have taken with them a love for the town and its mass meeting of citizens, though in many other sections the county, in view of the thinness of the population, and the general disadvantages attending many governments where one would just as well serve the people's few needs, is in the ascendency.

Existing side by side with these various forms, and coincident in some cases with them, are the municipal corporations, the cities of various classes and grades, the boroughs, villages, incorporated towns and hamlets, which act under charters of more specific derivation. Usually when a certain area is incorporated, it combines in its new government, with whatever new powers it may have obtained, those formerly exercised over this district by the township. The township government, therefore, in respect of this territory, ceases to exist, and the village, borough or whatever its name, takes its place. The relations of the new incorporation to the county, however, continue as before. With respect to larger cities, they not infrequently attain such size that they occupy entire counties, or are created into separate counties. Thus the boundaries of not a few of our great municipalities are coterminous with the counties in which they are situated, the city and county administration being carried on in such a way that to the ordinary citizen the point at which one ceases to act and the other enters upon the fulfillment of its duties, is not readily to be distinguished.

There are, too, other local districts which have been organized to serve some specific purpose, and which exercise *quasi* corporate power. One of the most common forms is the school district, a territorial area sometimes coincident with the town or township, though more often having different boundaries. This exists as its name implies, to further the system of public education, enabling the people to tax and bond themselves for school purposes. There are likewise "irrigation districts" in arid regions, "sanitary districts" in swampy lands, "levee districts" in States bordering on rivers which overflow their banks,—notably the Mississippi, "road districts" where it is a question of extending and improving highways, "park districts", "fire districts", "fencing districts", etc.

It is a fact, then, beyond dispute, that the legislature has very large and indeed almost unlimited powers over municipal corporations, and the *quasi* corporations, such as counties, townships, school districts, etc., except as this power is in words withheld from it, or it is restricted in the exercise of its functions by the constitution. The State has created the local governments, and the State acting through its two law-making bodies, the legislature and the convention, is responsible for the general conduct and management of the local corporations. They may be self-governing to a larger or a less extent, according as to the terms of the bill or charter from which their authority is derived. Some are self-governing by title drawn from the legislature, some point to the convention as the source of their extensive powers. It is here our special task to indicate to what degree the people have been brought in, by one or the other or both of these bodies, and have become their own law-makers in the various local communities of the United States.

In the first place, as we shall later see, the distinction which is drawn in the State is valueless in the city, the county and the local district. While in the State, the legislature must submit to the constitution if it desires to submit a law to the people, and make its passage depend upon their acceptance

of the act, in the matter of laws for the localities, the legislature has original authority by reason of its comprehensive powers over the corporations which it creates. There are not a few instances in which law-making by popular vote in the local districts is provided for in the State Constitutions, but the legislature can employ the referendum without such definite authorization. The practice of many years entrenches us in this view, the judiciary has generally given its acquiescence and support to this steadily developing tendency, and the only distinction to be observed in this connection is this,—that while a legislature *must* submit a question of local government to vote of the people when enjoined so to do by the constitution, it can in other cases in which the constitution is silent, act at its own sole discretion. In what classes of subjects, and to what degree legislation by the people has secured a foothold in this department of American law, will now be explained.

In the States, as we have noted, three general classes of subjects have become topics for a direct vote of the people:— First, subjects pertaining to the form, the scope and jurisdiction of the State governments, as in the referenda on the question of calling a constitutional convention, on new constitutions, on the change of State boundaries, and the location of State capitals; second, subjects having to do with debt, taxation and finance; third, subjects of a vexatious character upon which the people are likely violently to disagree, as the regulation or prohibition of the trade in intoxicating liquors, the extension of the suffrage, etc. This classification may be conveniently carried down into the local districts, and we come first to that large group of subjects which have a bearing upon the character, form and jurisdiction of the local governments.

It will conduce to a more intelligible result if this class be divided into four separate sub-classes of referenda which will be found to relate to the following matters:

(1) The determination of the area of the local political districts, their boundaries, etc.

(2) The selection of county seats and sites for court-houses, city halls and other public buildings.

(3) The selection of a corporate name.

(4) The choice of a city charter or local government act, and the determination of the particular legal form which the government shall take.

We have (1), therefore, referenda to determine local territorial and boundary questions. In this class there is in the first place a vote of the people in the matter of forming a new county, or of changing the boundaries of counties already organized. Just as the people of the District of Maine were allowed in 1819 to decide for themselves whether or not they should organize a separate State and part company with Massachusetts, so it is usual for the people of the principal district into which the State is divided for purposes of local administration,—*i. e.*, the county, to determine the question of cutting loose from an older county, and of leading a separate life. In many of the newer States of the West, the organization of new counties takes place very frequently. As the inhabitants increase in number, the counties already in existence are found to be inconveniently large, and it appears desirable and expedient to reduce the limits of the political districts, and thus consolidate the work of local administration.

Sometimes the change of boundaries is not so thoroughgoing. A separate county is not created, but a part of one county is stricken off, and is added to another county. This referendum, like many that are to follow, had its birth in special acts of the legislature passed to meet specific needs in individual districts. It then came to be a subject for general laws, a uniform process being prescribed in all parts of the State when it was desired to form new counties, and alter the boundaries of old ones. More recently the constitutional conventions have taken hold of the question, and as if to put it securely into the State practice and prevent any failure by the legislature, the Constitutions of twenty States to-day require this referendum, viz: Arkansas, Colorado,

Idaho, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.[13] It is usual to consult not only the people of the district which is to be created into the new county, or the people of the old county which is to receive the new territory, as the case may be, but also the citizens of that county from which it is proposed that the territory shall be taken away. This rule, however, is not always observed. Often only the qualified electors residing within the limits of the immediate district to be transferred, participate in the referendum.

Again, when it is a question of abolishing a county government, and merging or consolidating it with another, the occasion is frequently held to call for a vote of the people, and this plebiscite, in several States, is guaranteed by the Constitutions. Definite rules are often established by these instruments for the guidance of the legislatures in their work of organizing new counties, and in moving county lines. It is sometimes prescribed, for instance, with a view to preventing the people from making too free use of this privilege, that there shall be no changes which will reduce a county's population below a certain limit or its area below a certain number of square miles.[14]

In municipal corporations, townships and other local districts which are of smaller size than the county, the citizens at large often have a voice in deciding territorial questions. In practically all parts of the Union, it is usual to consult

[13] A single reference may perhaps suffice. The Constitution of Nebraska of 1875, art. x, secs. 2 and 3, says: "No county shall be divided or have any part stricken therefrom, without first submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county voting on the question shall vote for the same. There shall be no territory stricken from any organized county, unless a majority of the voters living in such territory shall petition for such division, and no territory shall be added to any organized county without the consent of the majority of the voters of the county to which it is proposed to be added."

[14] Cf. Constitution of South Carolina, art. vii, secs. 3 *et seq.*

their wishes when the people inhabiting any definite area are to be incorporated for purposes of government. Thus, at the beginning of the life of the municipality the people may decide what the scope of the corporate powers shall be, and from the hamlet or village upward to the largest city, the referendum finds its application.

When fresh territory is to be added to the district, a vote of the people is very common. When one municipal corporation is to be united with another, it is the almost universal rule to consult directly with the people of the districts which are to be parties to the merger, if not of both municipalities, at any rate of the smaller, whose individuality is likely thus to be swallowed up. We have, therefore, the referenda upon the annexation of one area to another, the extension or reduction of corporate limits and the like, which are provided for in the statutes on local government in nearly all the States. Localities which have once been consolidated may be separated again, upon vote of the people. Having once received a charter of organization, the people of a municipal district may decide whether it shall be surrendered. They may vote to remit certain portions of the municipal area to the county.

Irrigation, sanitary and other local districts organized to carry on local improvements are created, their boundaries are changed, and they are disorganized again by direct vote of the people.[15] New school districts are organized and two or more districts are united by vote of the citizens, sometimes both male and female, in States which have school suffrage for women. In Wyoming[16] and South Carolina[17] the Constitutions specifically provide that no city or town shall be organized as a corporation, without the consent of its inhabitants. The boundaries of "judicial districts" (subdivisions of a county) in Mississippi[18] may be changed only after a referendum. The subdivision of townships is often made a

[15] California and Idaho afford a number of statutes in point.
[16] Constitution of 1889, art. xiii, sec. 2.
[17] Constitution of 1895, art. viii, sec. 2.
[18] Constitution of 1890, art. xiv, sec. 260.

subject for popular vote,[19] and wards in cities are sometimes divided and new wards are created in the same way.[20] In Indiana, oddly enough, the people of the entire city rather than of the single ward to be divided, determine the question of the establishment of a new ward.[21] Coming down to political districts still smaller in size, we find that the people vote by referendum in Ohio for the consolidation of the precincts of a township.[22] So general, indeed, is this local plebiscite in its various forms that it may now be regarded as a necessary part of the American system of local government, though, of course, since the legislature is in possession of unlimited powers over the local corporations, except as it is restrained by the State constitution, it may usually confer this privilege upon the people or withdraw it from them again at its own pleasure.

(2) The people of local districts very generally enjoy the right to decide at what point the local government shall be administered. Thus the unpleasant question of a choice of site for the county capital is often referred to the people. There are local rivalries and jealousies which might react to the disadvantage of the members of the legislature, when they sought a re-election, if they should undertake to decide such a matter on their own responsibility, and they are usually well satisfied in this case to make over their functions as the lawmakers to some other agent. As the electors of the State are frequently asked to select a site for the State capitol buildings, so the electors of the counties have come to be looked upon as the proper authority to make a choice of county seats. This referendum has become so firmly established in the American practice, that the Constitutions of twenty-two States now contain guarantees on this subject, as follows: Arkansas, California, Colorado, Georgia, Idaho, Illinois, Kan-

[19] Cf. Pennsylvania Laws of 1857, p. 93; *ibid.*, 1879, p. 52; *Revised Statutes of Missouri*, 1889, p. 1954.

[20] Pennsylvania Laws of 1874, p. 230; *ibid.*, 1889, p. 277.

[21] Horner's *Indiana Statutes*, 1896, sec. 3038.

[22] *Revised Statutes of Ohio*, 7th ed., 1896, secs. 1398 *et seq.*

sas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington and Wisconsin. The Constitution of Louisiana of 1898, so recently adopted, says upon this point: "All laws changing parish [county] lines, or removing parish seats, shall before taking effect, be submitted to the electors of the parish or parishes to be affected thereby, at a special election held for that purpose, and the lines or the parish seat shall remain unchanged unless two-thirds of the qualified electors of the parish or parishes affected thereby vote in favor thereof at such election." [23] Even in States in which the vote is not made obligatory by constitution the legislatures usually submit county seat questions to the people, and this referendum is now very familiar everywhere.

In order to minimize the ill effects of too frequent change, devices of different kinds are employed. Thus it is often specified that when the seat of government has once been located, the question shall not be referred to the people again for a definite number of years. This period may be four years or five years or ten years or even twenty-five years (Indiana). If the county buildings are of considerable value, checks of other kinds are often introduced as a means of preventing a removal of the capital to another town, where new buildings would have to be erected at the taxpayers' expense. The tendency in recent years, as will be explained in my chapter devoted to the Initiative, has been wholly in the direction of restricting the people in the exercise of this privilege. In new communities, the desire of those persons residing in some particular locality to get the seat of government which they believe will enhance the importance of their town, is so great that unless restraint were put upon the people, these county seat contests would be engaging the electors' attention almost constantly. Such restrictions, it is fair to say, however, have been introduced to counteract the very democratic

[23] Constitution of Louisiana, art. 278.

influence of the initiative rather than of the referendum. So much bitterness has been engendered in the Western States in the struggle for county capitals, that rioting and bloodshed have sometimes been brought into the argument, when words were exhausted, and the whole subject affords chapters which are not very creditable parts of the history of the progress of democratic government in the United States.

As in the counties, so in other local districts, corporate and *quasi*-corporate, the choice of the sites of public buildings is a question which is often referred to popular vote. In Philadelphia, for instance, when it was desired that a site should be designated for a city hall, which it was proposed to erect, the legislature submitted the question to the people of the city.[24] That site receiving a majority of the whole number of votes cast was to be selected. The choice lay between "Penn Square" and "Washington Square", and it may be of interest to note that the total number of persons voting was 84,450, Penn Square receiving 51,625 votes, and Washington Square 32,825. The total vote for Governor in Philadelphia in 1872 was about 118,000, so it is seen that a question of this kind is sometimes capable of arousing a great deal of local interest, as more than 70 per cent. of all the electors voting for Governor in 1872, had voted for the city hall proposition in 1870.

In Kansas, in reference to cities of the first and second classes, which are county seats, there is a general law requiring that a proposed change of a court house site from one part of the city to another, shall be submitted to popular vote.[25] An election was held in a Pennsylvania township in 1877, to determine upon a site for a poor house,[26] and in Illinois the people of townships vote to change the place of holding their town meetings,[27] a matter which of course would be decided by the people anyhow, in all local dis-

[24] Pennsylvania Laws, 1870, p. 677.
[25] Webb's *General Statutes* of Kansas, 1897, chapter 27, sec. 22.
[26] Laws of 1877, p. 40.
[27] Starr and Curtis' *Annotated Statutes* of Illinois, 1896, p. 209.

tricts where they still retain their primary assemblies, in common with other questions affecting the local government.

(3) In local communities there is sometimes a referendum to select a corporate name. Thus in Idaho, by a law of 1891, the name of any town, village or city in the State may be changed only upon a two-thirds majority vote of the electors of the particular district concerned. A special election on this subject must be called upon the presentation to the proper authorities of a petition, signed by a majority of the legal voters of the town, village or city, as the case may be.[28]

A somewhat similar provision respecting the change of name of local districts is found in the laws of Iowa.[29] In Iowa towns the ballots read as follows: "Shall the proposition to change the name of —— to —— be adopted?" the people voting "yes" or "no".[30] In Kansas also the people may vote upon proposals to change the name of any town, village, city or township,[31] and in Minnesota the electors of cities and villages possess this privilege.[32] These are interesting instances of the people's direct participation in a kind of law-making which must have a sentimental rather than any real or practical interest for them.

(4) Again the people of local districts often decide as to the legal form and character of the government under which they are to live, once more, of course, only in so far as the convention or the legislature accords this privilege to them. The most complete and thoroughgoing resignation of functions to the whole body of electors in the local communities is met with in the submission to popular vote of city charters and local government acts. There are, for example, referenda on "special" acts of incorporation, that is, on acts applying to separate single designated cities where this kind of

[28] Laws of Idaho, 1890-91, p. 127.

[29] Cf. *Annotated Code* of the State of Iowa, 1897, secs. 461 and 580.

[30] *Ibid.*, secs. 628-629.

[31] Webb's *General Statutes* of Kansas, 1897, ch. 125, sec. 3.

[32] Laws of Minnesota, 1895, pp. 16 and 641; *ibid.*, 1897, p. 510; cf. also Laws of New York, 1897, p. 454: Public Laws of North Carolina, 1895, p. 41, and *Compiled Laws* of Utah, 1888, Vol. I, p. 314.

legislation is still permitted by the State constitution. In States having "general" laws, the people of municipalities decide whether they shall give up a town, village or borough government, and adopt city government, or abandon a special charter under which they have previously acted, and come under the general law; they may decide too when they have once been incorporated under the general law whether they shall advance or reduce their grade, and enter a new class, thus securing a charter which may perhaps be better adapted to local needs. In some States, as Missouri, California, Washington and Minnesota, there is finally an almost complete surrender of the charter-making power to the cities, the people thereof voting to approve or reject the charter, the frame of which their own delegates have prepared. In California, it was lately proposed to give the people of counties similar rights with respect to the framing of their county government acts,[33] a measure which, had it become a part of the State Constitution, would have marked a new and sweeping development in the annals of local government in the United States. This reform would have rendered each county in the State of California, as well as each city containing a population of more than 3,500, in a measure self-governing, and free from the legislature's control.

Since it illustrates an important phase of American political development, and is a contribution to the great number of panaceas which have been suggested as a cure for the singular maladies afflicting the government of cities in the United States the referendum on city charters is entitled to and will receive separate treatment in a subsequent chapter of this book.[34]

It is the custom too for many legislatures to submit various kinds of bills which ostensibly or disguisedly amend city charters and the established systems of local government. These are mostly presented as "special laws", or as laws

[33] Statutes of California, 1897, p. 641.
[34] *Infra,* chap. 14.

which if nominally "general" are essentially special in their effect. They are of many different outward types. There are "alternate" laws, the people of a city or county selecting one or the other as they may prefer, and "local option" laws which are "general" for all the localities, but which come into effect only in such districts as may by popular vote agree to adopt them. Many of these laws will appear in our subsequent classifications, but others, because of the subject matter of which they treat, must be alluded to in this place.

The recent practice in New Jersey furnishes some notable illustrations. We have, for instance, the act of 1886, concerning cities[35] which fixes the terms of office of the mayor and the members of the city council, develops the mayor's powers and prescribes his duties in respect of ordinances and resolutions, selects a day for the holding of municipal elections, etc. This is clearly not a regular charter or act of incorporation though it is in effect an act amending a charter. It is to be forceful in no city until it is submitted to the people thereof, and they shall vote to accept it. By a law passed by the legislature of New Jersey in 1885, a proposition to place the public schools of cities in charge of a "board of education", which should be newly created and take the place of an older administrative body, was referred to the people. "The board of aldermen or common council" might "submit the question of the acceptance or rejection of the act" to the voters of any city which should express a desire to avail itself of this privilege.[36] The question of "removing" the fire and police departments of the cities of New Jersey from "political control" by the creation of boards of commissioners to be nominated by the mayor, thus materially modifying the scheme of government in those municipalities voting to adopt this policy was left to the arbitrament of the people by a law which passed the legislature of that State in 1885.[37]

Laws of this kind, many of them comprehensive enough to

[35] *General Statutes* of New Jersey, 1896, p. 575; P. L. 1886, p. 361.
[36] *General Statutes* of New Jersey, p. 3085.
[37] *Ibid.*, p. 1551.

serve as entire charters, some being financial proposals of uncertain worth, for which the members of the legislature are not desirous of assuming the responsibility, and others mere acts arranging alternate systems of government and administration, abound in the statute books of New Jersey. Such confusion exists in the public corporation law of no other State, and there are conditional acts it would seem to meet almost any conceivable need, which may arise in any town or city in the Commonwealth.

In Illinois by an act passed in 1895, the people of any city in the State may adopt the provisions of a general law regulating and reforming the civil service. In the submission of this law the legislature probably had a mixture of motives.[38] There ought to have been, in the first instance, no question about the desirability of such a law, but as it was a reform of which some classes of American politicians seem not to be fond, as it involved some outlay in salaries for certain administrative officers (civil service commissioners) and as it altered the city charters, it was passed in a conditional form.

In Iowa the people may vote upon the proposition to increase the number of "supervisors", as the members of a county administrative board are called, from three to five or seven members. Later the number may be reduced again to five or to three, as the voters may elect.[39] Somewhat similar privileges are enjoyed by the people of the counties of Nebraska,[40] and of North Dakota.[41] In certain local districts of Ohio, the electors may determine whether the number of members of the "board of education" shall be increased from three to six, the ballots containing the words "Board—Change" and "Board—No Change".[42]

Although it is rarely that laws bearing upon the important

[38] Starr and Curtis' *Annotated Statutes* of Illinois, 2nd ed., 1896, p. 826.

[39] *Annotated Code* of the State of Iowa, 1897, p. 221.

[40] *Compiled Statutes* of Nebraska, 8th ed., 1897, p. 430.

[41] *Revised Codes* of North Dakota, 1895, sec. 1892.

[42] *Revised Statutes* of Ohio, 7th ed., 1896, sec. 3911.

subject of the administration of justice are passed in a conditional form, a few points as to the organization of the courts are sometimes left to the determination of the people. Thus in South Carolina, county courts are established upon popular vote in the counties,[43] and in West Virginia with the assent of a majority of the voters of a county, the county court may be abolished, and may be replaced by another tribunal.[44] In any city of more than 7,000 inhabitants, in Iowa, a "superior court" may be established to take the place of the "police court".[45] The court so created may be abolished again by direct vote of the people.[46]

A law of 1892, in Kentucky, gives the people of counties a choice as to the character of the county governing board. They may have a "fiscal court" composed of the judge of the county court, and the justices of the peace of the county, or a "fiscal court" composed of three commissioners elected *scrutin de liste* for the whole county for their special task, together with the county judge. A majority of the votes cast upon the question are decisive, and the election on this subject in any county shall not be held oftener than once in every eight years.[47]

In any town in Massachusetts, containing at least 12,000 inhabitants, which may desire to adopt a city government, the people may determine whether the city legislature shall have one chamber or two, and the terms for which the members thereof, and the mayor, shall continue in office.[48] In cities of Illinois, the question of "minority representation" in the city council is referred to popular vote.[49] In Missouri cities of the second class, with the approval of the people, may establish boards of public works, which as their name would

[43] Constitution of South Carolina, art. v, sec. 1.
[44] Constitution of 1872, art. viii, sec. 34.
[45] *Code* of Iowa, p. 171.
[46] *Ibid.*, p. 174.
[47] Kentucky Statutes, 1894, p. 687.
[48] Supplement to the Public Statutes of Massachusetts, 1889, 1895, p. 623.
[49] *Annotated Statutes* of Illinois, p. 687.

imply, are to exercise control over the various public works and buildings within the city limits. These boards may be abolished again on vote of the people in which case the enterprises under their care revert to other administrative agents.[50]

The electors are sometimes given a hand too in matters pertaining to local administration by the system of "alternate laws". This kind of conditional legislation is well illustrated in West Virginia in several acts on the subject of roads. In that State the legislature has definitely prescribed a method by which in the usual course of things, highway affairs are locally regulated. In addition, however, there are as many as three alternate methods provided for, in the laws of 1872-73, 1881, and 1891, respectively, which may be adopted in any county or district in the State when the people thereof vote in favor of the change. Having once accepted the provisions of the alternate law, the electors if they desire, may later vote to discontinue the new system of administration.[51] In Michigan the voters decide whether the county or the township shall take charge of the roads,[52] and in Minnesota and in some other States, the people determine whether the county or the town shall care for the poor.[53] Several other questions having to do more or less directly with the form and character of the local governments are sometimes referred to popular vote, and thus the whole body of citizens put their direct impress upon the legal system by which their common affairs are regulated.

In many States it is a matter for the people themselves to determine whether or not counties shall be subdivided and organized into townships, and once organized, whether they shall be disorganized again. Mr. Bryce regards this referendum as one of the results of the conflict between the county

[50] Laws of Missouri, 1891, p. 52.

[51] *Code* of West Virginia, 3rd ed., 1891, pp. 338 *et seq.*

[52] Laws of Michigan, 1893, p. 239.

[53] *General Statutes* of the State of Minnesota, 1894, sec. 1984; cf. Laws of Pennsylvania, 1879, p. 78.

and the township system of government in the Middle West where the streams of influence from New England and the South join, and it is uncertain for the time being, which shall have the mastery. In a measure this is true, but it is furthermore a natural development in newly settled territory, to pass from the larger to the smaller unit. A sparsely settled district can naturally manage with a simpler form of government than a community in which men's interests meet and overlap on every hand. When a county becomes more populous, and public affairs engross a larger share of the people's attention, the need is felt for a more intensive system of administration.

The citizens of the counties often themselves decide when, in their view, the time has arrived for the township system to be introduced. In seven States,—California, Illinois, Missouri, Nebraska, North Dakota, Washington and Wyoming, this referendum finds a place in the Constitutions. For example, the Constitution of Missouri says: "The General Assembly may provide by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election, shall so determine. * * * In any county which shall have adopted township organization, the question of continuing the same may be submitted to a vote of the electors of such county at a general election, in the manner that shall be provided by law; and if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county." [54]

[54] Constitution of 1875, art. ix, secs. 8 and 9.

CHAPTER X

THE LOCAL REFERENDUM—LOAN BILLS AND FINANCIAL PROPOSALS

Coming now to the second large class of referenda in communities in the United States we find that it includes those in relation to taxation and expenditure and the administration of the local finances. This is a department of public management in which there is room for much abuse, especially in large cities, and as a convenient method, in the first place, of putting a wholesome check upon representative officials and, in the second place, of transferring the responsibility for some rather debatable policy to the shoulders of those upon whom the burden will bear, that is the people at large, this plebiscite has attained a remarkable development in all parts of the Union. The officers of cities, counties and towns in many cases grossly betrayed the trust reposed in them and often heaped up large debts which were contracted on the credit of the community. This debt at times has weighed very heavily upon the ratepayers, and in some cases had wholly to be repudiated, as in a few of the States also, at an earlier period. To avoid the repetition of such scandals and to keep the debt contracting proclivities of city councilmen, county commissioners and other officers entrusted with such powers in reference to the various local communities within proper bounds, the constitutional convention at last took this subject in hand. It has thus come about that there is a large number of constitutional provisions on this topic at the present time, and these have been supplemented by laws passed by the legislatures, until the enactments in this field of legislation are of almost endless variety. There is not a State in the Union in which the electors at large have not been

brought in to some extent to balance the representative boards and legislatures, with the object of securing honester and more economical management. In the main the results are considered to have been better, strange as this may seem to those who cannot well conceive of government except as it is embodied in the persons of a few wise and considerate men, than under the old system prior to the time the people were invested with the local veto.

This referendum appears in at least three separate forms on three large classes of subjects as follows:

(1) Loaning the public credit to industrial and other private companies.

(2) Expenditure of public money directly by the government itself.

(3) The sale or lease of public lands and other public property.

The local plebiscite on these three different classes of subjects is almost entirely an outgrowth of the latter half of the nineteenth century. A beginning was made with it, however, at a somewhat earlier period in a form which is so characteristic that I have put it at the head of the list, namely, (1) The loaning of the public credit to industrial and other private companies organized for the purpose of helping forward with the economic development of a given territorial district. The experience has not been the same among all peoples but it was the method in vogue in the self-governing Anglo-Saxon communities of America at first to give as little as possible to the government, retaining for private pursuit and gain the business of transportation, public lighting, the furnishing of a public water supply, etc. The American communities had in the beginning only a bare framework of power. When roads were to be built they were constructed and owned by private companies who charged travellers a fee for passing over them. When streams were to be crossed private persons bridged them and collected tolls of those who wished to reach the other side. The railways and most of the American canals have had a similar history and the

government with us—at any rate in the newer communities—until a recent time, has exercised few functions which would make it a competitor in any way with private enterprise. So firmly established was this idea in our polity that it was carried to the point of excluding the community from the function of educating the young at government cost, and many other of the state's activities, now rarely brought into question by anyone, had not yet begun to be exercised. It was argued, on the one hand, that it could not be the duty of the richer and more favored classes to assist in educating the children of the poor, and, on the other hand, that it would be an injustice for government to found and maintain free schools since those citizens who conducted educational institutions for private profit would thus be deprived of a means of personal financial advancement. Ideas in the *laissez faire* economy so extreme as these have been generally abandoned. But the general question as to the expediency of performing many classes of local functions at the public expense is still a matter which is frequently referred to a direct vote of the taxpayers.

It was an early stage of the development toward complete state ownership and management to assist private corporations in respect of local works, and the people's participation in voting grants and guarantees to improvement companies of this kind was an interesting phase of the movement. A very early instance of the employment of such a method as a means to an amicable result in the settlement of a question of appropriating public money in behalf of an internal improvement is furnished by Virginia.[1] In 1784 the legislature of that State passed an act which had for its object the deepening of the channel of the James River. Later it was desired still further to open up the interior of the country, to establish, indeed, a complete line of communication from tidewater by way of the James and Jackson Rivers to the Kanawha River and thence to the Ohio and the Mississippi. "A large ma-

[1] Acts of Virginia, 1832-33, p. 57.

jority of the citizens" of Richmond being of opinion that the corporate authorities should "subscribe to the stock" of a company, "the James River and Kanawha Company", an act was adopted by the Virginia legislature in 1833 authorizing the city to make a subscription of $400,000 to this enterprise.[2] In 1835 a second act conferring authority upon the city to subscribe an additional sum of $250,000 to the stock of the company was passed by the State legislature, again at the expressed desire of the people of Richmond.[3] In each case the city authorities were empowered to borrow money on the credit of the municipality and to tax the citizens in order to raise the necessary funds to pay the interest on the loan and the principal of the same as it should fall due. Although these laws were not submitted to the people of Richmond by way of the referendum, they were passed in response to petitions very numerously signed, and the principle is so similar that the case is of much interest as indicating how one important class of conditional legislation made its way into the American practice.

The question of communication was a very serious one as the colonists pushed farther and farther into the interior of the continent. The commercial interests of the country were rapidly expanding, the need for facilities of transport from one section of the Union to another was much greater than was the ability of a financially poor population to satisfy it. Canals were to be constructed wherever water communication was possible. "Turnpikes", "plank roads" and other highways of public traffic were to be built so that wagoning over the natural, unimproved routes would be less laborious and haulage by horse or mule or ox between the principal points might become a feasible form of commerce. A conditional law to the advantage of private turnpike companies was passed by the legislature of Pennsylvania in 1842.[4] By

[2] Acts of Virginia, 1832-33, p. 57.

[3] Acts of Virginia, 1834-35, p. 70; cf. Goddin *v.* Crump, 8 Leigh. p. 120.

[4] Laws of 1842, p. 233.

this act whenever "at least twelve taxpayers" of any township should petition the supervisors of public highways to subscribe to the stock of a turnpike company, which proposed to construct its roads through the township, the supervisors, after advertising the election in notices posted up at six "of the most noted places" in the township, were obliged to submit to the people the question of "accepting the provisions" of the act. At the same time the electors were to decide what sum the township should subscribe to the company. This act in common with some of a similar nature in other States remains unrepealed to this day though elections on the subject in Pennsylvania have been rarely held in recent years.[5] The governing boards of counties in Kentucky may take stock in companies organized to construct and operate turnpike, plank and gravel roads within the bounds of these counties, if the people first assent to the levy of a tax to pay for the subscription.[6] The citizens of any township in Michigan, in lieu of an actual grant of money, may vote a plank road company the "right of way" through the township, giving to the company, therefore, the privilege to use the public highways.[7] Counties, towns, cities and other local communities exercising fiduciary functions in Minnesota may with the popular assent issue their bonds in exchange for the stock of companies which are organized to construct canals and improve the waterways of that State.[8] The citizens of counties, cities and towns in Virginia have the less specific privilege of voting a public subscription "to the stock of any internal improvement company" which has been incorporated by the State legislature.[9]

When the railway appeared as an agent in the work of internal development, yet larger outlays were required and nearly all the States, in order to help on with railway build-

[5] Cf. Brightly's Purdon's *Digest* of Pennsylvania Laws, 12th ed., 1894, p. 2045.

[6] Barbour and Carroll's Kentucky *Statutes*, 1894, secs. 4734 *et seq.*

[7] Public Acts of Michigan, 1897, p. 118.

[8] *Statutes* of Minnesota, 1894, secs. 1441 *et seq.*

[9] *Code* of Virginia, 1887, sec. 1243.

ing, permitted the people to decide whether the local governments should subscribe to the stock of the companies on public account. The people in this case, however, as in some others which I shall soon mention, have seemed not to serve as an effective brake upon the too free use of public moneys. Although the theory clearly indicates that those upon whom such a burden will ultimately fall would aim to discourage large expenditures of this kind, the public funds to most men appear to come from an inexhaustible source, and they vote money away with little thought as to how the debt shall be paid. In the presence of a proposition for the construction of a railway through their own county or town the prospects are such as often to induce great liberality to private companies. As a result, grants have been made most unwisely, and the experience of municipalities in nearly all sections of the Union has been very unfortunate. By these local subsidies railways were built which were in no sense profitable as business enterprises. Financial difficulties followed and involved the counties and cities seriously, so that the legislatures or the conventions in many States have lately prohibited such grants absolutely. The public policy regarding railways has undergone a complete *volte-face*, so that to-day railway corporations must exercise great alertness to defend their own interests in the legislative assemblies, and the tendency is distinctly in the direction of applying restraint to the companies, while there is a growing disposition to look upon the whole business of transportation as one inhering solely in the government as in most European states.

The subscription abuse was considered to have become so great in Illinois by 1870 that a separate section of the constitution was submitted to and adopted by the people of the State. This provision was as follows: "No county, city, town, township or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation or make donation to or loan its credit in aid of such corporation."[10] This is an effectual prohibition upon the

[10] Constitution of Illinois of 1870, separate section.

legislature and prevents it authorizing such grants even by way of the referendum.

In several States, however, the practice is still permitted and is in general and frequent use. In not a few cases a plebiscite, when it is a question of making public grants to companies, is specifically authorized by the State constitution, as in North Dakota, Nebraska, Tennessee and North Carolina. In North Dakota, for instance, the Constitution says: "Neither the State nor any county, city, township, town, school district or any other political subdivision shall loan, or give its credit, or make donations to or in aid of any individual, association, or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association, nor shall the State engage in any work of internal improvement unless authorized by a two-thirds vote of the people." [11]

The Constitution of Tennessee says: "The credit of no county, city or town shall be given or loaned to or in aid of any person, company, association, or corporation except upon an election to be held by the qualified voters of such county, city or town and the assent of three-fourths of the votes cast at said election," etc.[12]

And in Nebraska the Constitution says: "No city, county, town, precinct, municipality or other subdivision of the State shall ever make donations to any railroad or other work of internal improvement unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law," etc.[13]

The compiled statutes of Maryland,[14] North Carolina,[15]

[11] Art. xii, sec. 185.

[12] Art. ii, sec. 29.

[13] Art. xii, sec. 2; cf. Constitution of Maryland, art. xi, sec. 7, for a similar plebiscite in Baltimore, and Constitution of North Carolina, art. vii, sec. 7.

[14] Cf. Laws of Maryland, 1890, p. 430; Laws of 1892, p. 489; Laws of 1894, pp. 202, 884, etc.

[15] Cf. Laws of 1887, pp. 82, 157, 191, 215, 336, 346, 374, 434, 456, 523, 528; Laws of 1897, pp. 72, 98, 213, 493, etc.

South Carolina [16] and Tennessee [17] contain many recent instances of conditional legislation, authorizing public donations and loans to railway companies. In the laws passed at a single session of the legislature of North Carolina in 1889 I have found fourteen separate special acts by which the question of making such subscriptions was submitted to the people of local districts in that State. The citizens of townships, towns or cities in Iowa may vote a grant of money to "any railway company which is or may become incorporated under the laws of the State to aid in the construction of a projected railroad with in the State".[18] In Kansas in the same way counties, cities and townships may extend their aid to railway companies, if the electors thereof directly approve the appropriation.[19] In Louisiana the people of any parish, city or incorporated town have the more general privilege of voting a special tax in benefit of "any work of public improvement or railway enterprise".[20] There are elections on the same subject in the counties and other local districts of West Virginia;[21] and in Wisconsin donations may be made to railway corporations by a like process.[22] In towns and cities in Iowa the citizens may agree by way of the referendum to donate "to any railway company owning a line of railroad in operation or in process of construction in such city or town sufficient land for depot grounds, engine houses and machine shops".[23]

Not infrequently the inhabitants of local communities in America are invited to determine whether they will grant a bonus to an industrial or manufacturing company which it is desired shall establish a plant in a certain neighborhood. In

[16] Laws of 1894, pp. 949, 1068; Laws of 1896, p. 333, etc.

[17] Laws of 1897, p. 57; Laws of 1890, extra session, p. 73.

[18] *Annotated Code* of Iowa, 1897, secs. 2084 *et seq.*

[19] Webb's *General Statutes* of Kansas, 1897, chap. 48, secs. 13 *et seq.*, and chap. 70, sec. 70; cf. *ibid.*, chap. 37, sec. 73.

[20] *Revised Laws* of Louisiana, 1897, p. 373; cf. *ibid.*, p. 374.

[21] Warth's *Code* of West Virginia, 3rd ed., 1891, p. 284.

[22] Sanborn and Berryman's Wisconsin *Statutes*, 1898, secs. 945-46.

[23] *Code* of Iowa, secs. 885-86; cf. *General Statutes* of Kansas, chap. 70, secs. 107 *et seq.*

cities of Kansas the electors may sanction an appropriation of money which shall be used to "encourage the establishment of manufactories and such other enterprises as may tend to improve the city".[24] Recently the city of Wilmington, in North Carolina, was authorized by the State legislature to hold an election to decide whether the municipality should borrow the sum of $150,000 "to be given as an encouragement to new manufacturing enterprises which may be established within the limits of the city, or enlargements of plants already existing". The amount in this way granted for this use was to be placed in the hands of the members of a specially constituted board of trustees to be distributed for the best interests of the city to individuals and firms making the necessary guarantees.[25]

Grants to private companies which have in hand the economic development of a district in respect of some one particular industry are also not unfamiliar. Thus the people of counties or cities in Kansas may vote to subscribe, up to certain definitely limited amounts, to the capital stock of companies mining or boring for coal or natural gas or constructing artesian wells.[26] Townships and certain classes of cities in Kansas may extend the same encouragement to companies engaged in "the manufacture of sugar and syrup out of sorghum cane in their respective localities", if the electors assent to the expenditure.[27]

Without going to the point of subscribing to the stock of an industrial company, or making it an actual cash donation local governments encourage business enterprises which promise to increase the wealth and prosperity of the community by exempting them from taxation. Here again the people, voting in the referendum, are brought forward to decide as to the advisability of adopting such a course. For example, I may refer to the new Constitution of South

[24] *General Statutes* of Kansas, chap. 37, sec. 95.
[25] Laws of North Carolina of 1889, p. 867.
[26] *General Statutes* of Kansas, chap 36, sec. 5.
[27] *Ibid.*, chap. 152, secs. 1 *et seq.*

Carolina which says: "Cities and towns may exempt from taxation by general or special ordinance, except for school purposes, manufactories established within their limits for five successive years from the time of the establishment of such manufactories: Provided that such ordinance shall be first ratified by a majority of such qualified electors of such city or town as shall vote at an election held for that purpose."[28] In Rhode Island the people residing in towns and cities may also agree to exempt "manufacturing property" from taxation, the exemption in that State continuing throughout a period of ten years.[29]

In the contest between municipal and private ownership of water works, lighting plants and the like there are instances of public grants to private companies, but here we at once come into another phase of the development. The people are introduced into the system again, and this time in a different capacity, not to decide, as before, whether private capital which promises to do much to improve the condition of a neighborhood shall be encouraged to settle there, but whether private capital grown strong shall be given control of immensely valuable natural monopolies. The people were earlier to determine whether a certain amount of money should be expended to aid a struggling enterprise; now they are to fix upon the sum which the company controlling the enterprise shall pay in aid of the municipality. The situation has been reversed and, still not trusting their representatives, who in many cases have proven that they were open to pernicious and most dishonest influences, the people them-

[28] Constitution of South Carolina, art. viii, sec. 8. A carpet mill was recently established in Gaffney, S. C. The question of exempting the factory from taxation for five years was submitted to the people of the town on February 17, 1899, and the proposition was approved by a vote of 273 to 29.

[29] *General Laws* of Rhode Island, 1896, p. 177; cf. Local Acts of Michigan, 1891, p. 50, for an interesting provision of this kind in an act incorporating the city of North Muskegon. Here the exemption was to include taxes for both city and school purposes, as well as water rates for a period of ten years.

selves have been made the judges of the subject. Thus it is hoped to prevent city authorities from giving away valuable privileges to private lighting and water companies, to organizations of men who wish to use the streets for conveying passengers on the payment of a fee and for laying down or stringing wires for telegraph, telephone and other purposes. From the point of the city paying a private company to settle within its limits, to the point of the company making payments to the city for business advantages, seems rather a long step, and one which in this new country it has been very difficult to take.

Companies, however, have found the exploitation of certain lines of business so profitable in large centres of population that they not infrequently can spare a share of the gain for the members of city legislatures in return for favorable concessions. This abuse has recently become so great in many parts of the United States that we have turned helplessly to the referendum as a means of securing needed relief. Thus in Iowa we meet with an interesting statutory provision which is couched in the following terms: "No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places for any of the purposes named in the preceding section [telegraphs, telephones and electric street railways] unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election." [80]

In Nebraska a law relating to cities of the "metropolitan class", *i. e.*, cities containing more than 80,000 inhabitants, says: "No new franchise shall hereafter be granted, nor any extensions of franchises heretofore granted be lawful, unless an annuity to the city be provided, based upon either a fixed reasonable amount per year or a percentage on the gross earnings of the owners of said franchise, nor until a proposition for the same has been submitted to a vote of the electors of the city at a general city election or a special city election called for that purpose, and to carry such a proposi-

[80] *Code* of Iowa, sec. 776; cf. *ibid.*, sec. 720.

tion it shall require a majority of the electors voting at such election."[31] In any city or village in Wisconsin if ten per cent. of the qualified electors sign a petition in favor of an election on the subject, the question whether the village board or city council shall sell the street railway, lighting, telephone, waterworks or other rights and franchises to the highest bidder must be submitted to the people. In the event of a favorable vote in the referendum, any other method of disposing of these franchises than by competition and sale is precluded.[32] The electors of any city or village having decided to sell these valuable rights may later revoke their action in the same manner, *i. e.*, by petition and referendum.[33] In certain cities in Missouri the council may itself grant the original rights to private companies, but these are not to extend over a longer period than twenty years, and expiring, they are not to be renewed without the consent of the people.[34] The Constitution of Nebraska provides that "no general law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town or incorporated village without first requiring the consent of a majority of the electors thereof".[35] This referendum respecting city franchises has made its appearance among us very recently, but it seems likely to have rather extended use as a means of correcting an evil of wide prevalence and of real magnitude.

(2) Another large class of referenda in local communities, separately grouped for convenience' sake, includes such as relate to the expenditure of public moneys, not in aid of or in alliance with private enterprise, but by the government itself for its own general or special purposes in the exercise of its original powers. A government in its corporate and fiduciary capacity may issue bonds against the public credit and sell them in the money markets; it may contract a tem-

[31] *Compiled Statutes* of Nebraska, sec. 754; cf. *ibid.*, sec. 4036.
[32] Wisconsin *Statutes*, 1898, sec. 940j. [33] *Ibid.*
[34] Laws of Missouri, 1891, p. 60.
[35] Article on Miscellaneous Corporations, sec. 2.

porary loan to be repaid out of current revenues; it may make a direct appropriation, if it has money in hand in the treasury; and again it may levy taxes which in the usual case is a government's principal source of income. The people of local communities are called upon by law to approve or disapprove of all these transactions under varying conditions in the various States. They are often asked moreover to give their opinion upon the plain proposition for which the expenditure is to be made, whether it be the purchase of waterworks, the erection of a county courthouse or the improvement of a road. To the discretion of the representative boards or legislatures then is left the whole problem of providing the means to carry forward the specific work which the people have authorized. Sometimes the people vote twice or thrice on what is essentially the same proposition, first to engage in the undertaking, secondly, to incur the debt necessary to execute it, and thirdly, to levy the tax to take care of the debt. So far as we are concerned here, it is no matter in what manner the financial obligation is incurred by the local government; the principle is the same in all these cases and it will be our object in this place to keep in view simply the one fact—the purpose for which the money is to be expended.

Very usual is the submission of propositions which involve an outlay by the local governments for the erection of buildings for county, city or other public purposes and the purchase of sites for these structures. In the first place there are buildings which are used by the local government in its exercise of the police power and the administration of justice, as court houses and "town halls", jails, workhouses and houses of correction. Thus when bonds are to be issued "to build, repair or remodel courthouses, clerks' offices, jails and other public buildings in the several counties of Kentucky or to provide for the building, repairing or remodeling of the same", there is a referendum.[36] Again in Iowa "the board

[36] Barbour and Carroll's Kentucky *Statutes*, 1894, secs. 1872 *et seq.*

of supervisors of a county may not order the erection of a courthouse, jail, poorhouse or other building or bridge when the probable cost will exceed $5,000, nor the purchase of real estate for county purposes exceeding $2,000 in value until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election ".[37] In townships in Iowa the following question is submitted to the people: " Shall the proposition to levy a tax for the erection of a public hall be adopted ?" [38] In Minnesota the council of any city, borough or village with a population not exceeding 10,000 may submit the question of erecting a " city hall, market house, engine house, city offices or city prison ".[39] Likewise in Ohio two or more counties, the proposal having first been approved by the electors of the same, may unite to erect and maintain for their joint use a workhouse in which to utilize the labor of public misdemeanants.[40] This referendum in regard to " workhouses " also exists in counties in other States.[41] In certain counties in Georgia the people may decide whether a " reformatory prison " shall be established at the public expense for the purpose of taking care of misdemeanants under sixteen years of age.[42] " Houses of correction " with the same humane end in view are the subject of a plebiscite in the counties of Arkansas.[43]

With a beneficent interest in the welfare of the people, and

[37] *Annotated Code* of Iowa, 1897, sec. 423; cf. Webb's *Statutes* of Kansas, 1897, chap. 27, secs. 17-18; *Revised Statutes* of Florida, 1892, p. 275; *Revised Codes* of North Dakota, 1895, sec. 1923; Session Laws of Minnesota, 1895, pp. 693, 699; Constitution of Colorado, art. xi, sec. 6; Constitution of Missouri, art. x, sec. 2; Constitution of Michigan, art. x, sec. 9; *Revised Statutes* of Missouri, 1889, p. 278.

[38] *Code* of Iowa, sec. 567; cf. *Revised Statutes* of Ohio, 7th ed., 1896, sec. 1479.

[39] *Statutes* of Minnesota, 1894, sec. 1435.

[40] *Revised Statutes* of Ohio, sec. 2107a.

[41] Cf. Kentucky *Statutes*, 1894, sec. 4879; Minnesota *Statutes*, 1894, sec. 1987.

[42] *Code* of Georgia, 1896, Vol. III, secs. 1192 *et seq.*

[43] *Digest* of the Statutes of Arkansas, 1894, pp. 382 *et seq.*

with the object of protecting the incapable and the unfortunate, the local governments take charge of the poor. In certain communities in some States expenditure on this account is, however, conditional upon the direct assent of the citizens. Thus "poor farms", "poor houses" and "poor asylums" are acquired and established by the local governments by way of the referendum [44] and the taxpayers themselves decide whether they desire to expend so much money as will be required to maintain this branch of the administration. In Ohio "children's homes" may be established in counties in the same manner. These institutions are intended to serve as asylums for orphans or children for whose support parents have failed to provide.[45] By an act passed by the legislature of Illinois in 1891 cities are authorized to establish and maintain "non-sectarian public hospitals" to be supported by an annual tax which is to be turned into a "hospital fund". This tax is not to be collected in any city of the State, however, until the people of that city have first given their consent to the levy.[46] The purchase of land for the sites of public hospitals is contingent on the popular assent in certain cities of Nebraska,[47] and the erection of market houses in cities and towns is a subject which in other States is sometimes referred to popular vote.[48]

In the exercise of the local governmental function of guarding life and property from destruction by fire, questions in relation to the expenditure of public money are often submitted to the people. In many American cities there are "volunteer" fire departments which find their support in the same sentiments that induce private individuals to maintain

[44] Cf. *Statutes* of Minnesota, 1894, sec. 1987; Webb's *General Statutes* of Kansas, 1897, chap. 46, secs. 1 *et seq.*; *General Statutes* of New Jersey, 1896, p. 2522; *Revised Codes* of North Dakota, 1895, sec. 1495.

[45] *Revised Statutes* of Ohio, sec. 929; cf. *ibid.*, sec. 7821.

[46] Starr and Curtis' *Annotated Statutes*, p. 823; cf. Session Laws of Tennessee, 1897, p. 606; Acts of Idaho, 1890-91, p. 53.

[47] *Compiled Statutes* of Nebraska, 1897, sec. 1048.

[48] *Statutes* of Minnesota, 1894, sec. 1435; Laws of Maryland, 1892, p. 450.

free hospitals and schools, and to raise military companies for the common defence. In the more populous cities protection from fire tends all the while to become a public function and "paid fire departments" are organized as an integral part of the municipal system receiving their support from the public treasuries. In New Jersey, for instance, the people of cities may determine by a plebiscite whether they will adopt the paid fire department system and abandon the volunteer service.[49] In New Jersey, too, the people of incorporated towns may vote upon the question of the purchase of steam fire engines.[50] The legislature of Maryland recently authorized the officers of a town to submit the proposition of expending public money for the erection of a "hose house"; [51] in another town to consult the people in reference to making a "fire improvement loan" which was to be "applied and used exclusively for the construction of a fire alarm system".[52] In Pennsylvania boroughs the local officers may submit the question of levying a tax and expending the proceeds for the purchase of "hose for fire engine companies as may be required to furnish the said boroughs with a sufficient supply of water for the extinguishment of fires" and for the erection of "fire plugs or hydrants".[53]

Again, the local governments have developed a function of providing water and light, and in other ways the needs of the people are supplied through the public corporation instead of by private enterprise. Public ownership and control of these businesses in cities are undertaken with the object of supplying the necessities of the inhabitants at a reasonable price, and safeguarding them from abuses too likely to develop from a system which permits private companies to operate freely in this field. To take over water works, pumps, mains, gas or electric lighting plants from private companies or to

[49] *General Statutes* of New Jersey, p. 1504.
[50] *Ibid.*, p. 1481; cf. *ibid.*, p. 1528, and Acts of Idaho, 1890-91, p. 53.
[51] Laws of Maryland, 1890, p. 309.
[52] Laws of 1894, p. 72.
[53] Brightly's Purdon's *Digest*, p. 241.

construct these newly requires a large expenditure of money, and when such a step is contemplated the electors are very often asked to decide as to the advisability of engaging upon so important and responsible a task. In many States there are laws providing for referenda in cities, boroughs and towns on these subjects. One of the most thoroughgoing may be instanced, and this occurs in Iowa where cities and towns are authorized "to purchase, establish, erect, maintain and operate, within or without the corporate limits, waterworks, gasworks, or electric light or electric power plants with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites". But "no such works or plants shall be authorized, established, erected or purchased, leased or sold unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election".[54] The new Constitution of South Carolina says: "Cities and towns may acquire by construction or purchase, and may operate, waterworks systems and plants for furnishing lights, and may furnish water and lights to individuals, firms and private corporations for reasonable compensation; provided that no such construction or purchase shall be made except upon a majority vote of the electors in said cities or towns who are qualified to vote on the bonded indebtedness in said cities or towns."[55]

The construction of sewers and drainage systems in cities and towns is also a subject that is sometimes referred to popular vote. As necessary as such sanitary arrangements would seem to be, the installation of a suitable sewerage system is,

[54] *Annotated Code* of Iowa, sec. 720.

[55] Art. viii, sec. 5. For similar provisions respecting waterworks or lighting plants compare Starr and Curtis' *Annotated Statutes* of Illinois, p. 869; Session Laws of Pa., 1885, p. 163; *ibid.*, 1891, p. 90; Mills' *Annotated Statutes* of Colorado, Supplement, 1897, p. 1144; Laws of Connecticut, 1893, p. 380; Acts of Idaho, 1890-91, p. 53; Supplement to the Public Statutes of Massachusetts, 1889-95, p. 484; *Annotated Code* of Mississippi, 1892, secs. 2948 and 3014, and many others.

in some cases, made to depend upon the contingency of a favorable vote of the taxpayers.[56]

There are very many instances which might be cited to illustrate the part the people play in voting money to increase the fertility and cultivability of the soil, to improve the methods of public communication over roads and other highways, to facilitate navigation and to assist in the economic development of neighborhoods. The people vote in special "irrigation districts" and other local entities for or against taxation and the expenditure of money to improve arid lands. They vote to drain swampy lands, and to construct embankments and levees so that rivers may not overflow, doing damage, during freshets, to the surrounding country.[57] In Texas a tax for the construction of sea walls and breakwaters is the subject of a referendum. The Constitution of that State says: "All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of two-thirds of the taxpayers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof." [58]

The construction of roads, streets, bridges and pavements and the improvement and repair of the same are subjects upon which the people often vote in local districts. This referendum appears in a great variety of forms. We find that in Illinois, for instance, fifty land owners in any township may have an election called on the question of levying a tax not to exceed $1 on each $100 of the assessed valuation of all

[56] Code of Mississippi, 1892, sec. 3014; *General Statutes* of New Jersey, p. 207; Acts of Idaho, 1890-91, p. 53.

[57] Cf. Acts of California, 1891, p. 147; Laws of Idaho, 1895, pp. 184 *et seq.*; Webb's *General Statutes* of Kansas, chap. 79, secs. 71 *et seq.*; Barbour and Carroll's Kentucky *Statutes*, sec. 2414; Wolff's *Revised Laws* of Louisiana, 1897, p. 375; *ibid.*, p. 718; *Code* of Mississippi, sec. 3014; Session Laws of South Dakota, 1897, p. 219; Shannon's *Annotated Code* of Tennessee, 1896, secs. 3856 *et seq.*

[58] Constitution of Texas, art. xi, sec. 7.

the taxable property in the township for the purpose " of constructing and maintaining gravel, rock, macadam or other hard roads ".[59] Roads may be improved in the same way in local districts in Indiana [60] and in Kentucky.[61] In Minnesota the citizens with their own consent may be taxed for the construction of roads to be used for " steam traction transportation ".[62] In Michigan the board of supervisors of any county may authorize a township, " to borrow or raise by tax upon such township any sum of money not exceeding $1,000 in any township in any one year to build or repair any roads or bridges in such township " if the assent of the people shall first be obtained.[63] In States in which the privilege of managing turnpikes has been granted away to private companies the citizens may decide whether the local governments shall take control of the highways, abolishing the toll houses which have become a source of annoyance to travellers. The question of " free turnpikes " is submitted to popular vote in the counties of Kentucky,[64] Ohio [65] and Indiana.[66]

Similarly the people of local districts may decide whether public funds shall be expended for the erection or purchase of bridges. At an earlier day rivers, if sufficiently shallow, were forded; if deeper, wagons were usually carried over by ferry. These primitive devices were followed by the private bridge for the use of which the owners charged the traveller a fee. Later it came to be a question for the citizens to determine whether the community should not own and control the bridges. In several States the people vote to tax themselves or to issue bonds for this purpose, as in Kentucky, Michigan and Kansas.[67] In North Carolina there is the

[59] Starr and Curtis' *Annotated Illinois Statutes*, p. 3599.
[60] Horner's Indiana *Statutes*, 1896, sec. 5114ccc.
[61] Barbour and Carroll's Kentucky *Statutes*, secs. 4742 *et seq.*
[62] *Statutes* of Minnesota, 1894, secs. 1934 *et seq.*
[63] Howell's *Annotated Statutes* of Michigan, 1882, p. 202.
[64] Laws of Kentucky, 1896, p. 39.
[65] *Revised Statutes* of Ohio, sec. 4934.
[66] Horner's Indiana *Statutes*, sec. 5107.
[67] Cf. Webb's *General Statutes* of Kansas, chap. 44, secs. 9 and 24;

case of the people being called upon to decide whether bridges which were free shall be converted again into toll bridges. It was believed that the cost of keeping two certain bridges in a county in good repair was burdensome to the taxpayers, whereupon the question of re-establishing toll houses was submitted to popular vote.[68] In many cities and towns the people are directly consulted in regard to the construction of streets and boulevards.[69] The creation of indebtedness for the building or maintenance of "board walks along the sea-front" in cities located on or near the Atlantic Ocean, in the State of New Jersey, is a subject for a poll of the people.[70] Water courses and the channels of streams are sometimes deepened with the aim of improving navigation when the people declare their willingness to bear this additional expense.[71]

A park within a city in the strict sense is not a necessity, especially among a people who are still in a very utilitarian stage of civilization. There is a disposition to-day even in some very large American cities to leave it to private benefactors to establish and maintain public pleasure parks. In the cities of many States, however, the taxpayers may decide whether such an expenditure shall be made on the common account.[72]

As a means of beautifying the city, as a public health measure and for other reasons which are good and sufficient,

ibid., chap 45, sec. 1; *ibid.*, chap. 46, sec. 1; Kentucky *Statutes*, secs. 1862 *et seq.*; Michigan's *Annotated Statutes*, p. 202; *ibid.*, p. 406; Indiana *Statutes*, secs. 2880b. *et seq.*, and many others.

[68] Public Laws of 1893, p. 139.

[69] Cf. *Code* of Mississippi, sec. 3014; *General Statutes* of New Jersey, pp. 2150 and 2156; Acts of Idaho, 1890-91, p. 53; Laws of Colorado, 1893, pp. 462-63.

[70] Laws of New Jersey, 1896, p. 71.

[71] Cf. *Code* of Iowa, sec. 799.

[72] Cf. Laws of Colorado, 1893, pp. 462-63; Acts of Idaho, 1890-91, p. 53; Starr and Curtis' *Annotated Statutes* of Illinois, p. 852; *Code* of Iowa, sec. 860; Webb's *General Statutes* of Kansas, chap. 42, secs. 57 *et seq.*; Kentucky *Statutes*, sec. 2854; *Compiled Statutes* of Nebraska, 1897, sec. 1009; *General Statutes* of New Jersey, pp. 2613 and 2618; Acts of West Virginia, 1893, p. 111.

the city and other local districts sometimes purchase land for cemeteries. Thus in townships in Kansas and Ohio the question of selling bonds and investing the proceeds in cemeteries is submitted to popular vote.[73] In the cities and towns of Idaho there is the same referendum.[74] In Minnesota in towns, cities, villages and boroughs the people may vote to disinter bodies in abandoned cemeteries, to move and reset the tombstones in new grounds and then improve the old cemetery lands as public parks.[75] In a local district in Ohio the people were recently polled to determine whether certain graveyards, earlier under private control, should be transferred to the trustees of a township.[76]

Public money is also expended in a variety of ways with the object of advancing the general economic development of a community, but in a number of instances the popular assent to the grant which many of the taxpayers may possibly regard as an extravagance, must first be obtained. Thus in any city of the first class, in Kansas, the people may authorize a bond issue to an amount not exceeding $20,000 for the purpose of prospecting for coal within the city limits.[77] The question of the issue of bonds in like amount to defray the cost of boring or prospecting for coal may be submitted to popular vote in the counties of Nebraska.[78] In any county of the State of Washington on the receipt of a petition signed by twenty taxpayers the county commissioners must submit the question of making a public appropriation " for the purpose of boring or drilling into the earth for valuable minerals such as coal, oil, gas, salt or any other valuable subterranean production that is supposed to exist in quantities sufficient to justify boring for ".[79] The citizens of counties or townships

[73] Webb's *General Statutes* of Kansas, chap. 42, secs. 57 *et seq.*; *Revised Statutes* of Ohio, 7th ed., sec. 1465.

[74] Acts of Idaho, 1890-91, p. 53; cf. Laws of West Virginia, 1893, p. 111. [75] Laws of Minnesota, 1897, p. 23.

[76] Laws of Ohio, 1896, p. 736.

[77] Webb's *General Statutes*, chap. 36, secs. 1 *et seq.*

[78] *Compiled Statutes* of Nebraska, sec. 2272.

[79] *Code* of Washington, 1896, sec. 2456.

in Kansas may vote to assess and collect a "fire tax" which shall be used "to prevent the incursion of prairie fires" by "breaking, plowing, mowing or any other necessary method, burning strips at intervals", etc.[80] In the townships of Minnesota the people may determine "to build and maintain a fence at or near the township line for the purpose of preventing the spreading of Russian thistles over the lands of the township",[81] and in the same State the people may curiously vote to tax themselves to an amount not exceeding five mills on each dollar of assessed valuation "to pay for the destruction of grasshoppers and their eggs".[82]

In Ohio if a "county agricultural society" and the commissioners of any county are of opinion that the interests of the society and the county demand an appropriation from the public treasury for the purchase and improvement of the county fair grounds the question may be submitted to popular vote.[83] There is a referendum on the same subject in the counties of Kansas.[84] A law of 1897 authorized the people of counties in Nebraska to vote upon the question of appropriating money to an inter-state exposition.[85] In several States the people in their local communities determine whether premiums shall be paid from the common treasury for the destruction of various species of noxious wild animals. In counties in Nebraska the people may vote "For Bounties" or "Against Bounties", and if bounties are approved of any person presenting the scalps "with the two ears and face down to the nose" to the proper officials, with his oath that the animals were killed within the county where the premium is applied for, will receive $3 for each wolf or mountain lion and $1 for each wild cat or coyote so killed. Any county desiring to be released from the obligation of making

[80] Webb's *General Statutes* of Kansas, chap. 170, secs. 1 *et seq.*
[81] Laws of Minnesota, 1895, p. 633.
[82] *Statutes* of Minnesota, 1894, secs. 7885-86.
[83] *Revised Statutes* of Ohio, sec. 3703.
[84] Webb's *General Statutes*, chap. 174, secs. 1 *et seq.*
[85] *Compiled Statutes* of Nebraska, sec. 2303a.

these payments may later revoke its action by popular vote.[86]

By a law which passed the legislature of Kansas in 1871 the question of paying a bounty in counties to encourage the growing of hedges was submitted to popular vote. If the proposition were approved in any county in which the submission was made an annual payment from the county treasury of $2 for every forty rods of "osage orange or hawthorn fence" was authorized, for a period of eight years, to the person "successfully growing and cultivating the same".[87] This law was repealed in 1883.[88] In 1891 the Nebraska legislature passed an act authorizing the officers of any county, if the proposition were approved by the people at a special election, to issue and sell its bonds to an amount not exceeding $20,000, the proceeds to be used "for the purpose of raising money to purchase grain to be planted and sown in order to raise crops for the year 1891 and for feeding teams used in raising said crops".[89] This interesting bit of socialistic legislation was induced by a serious drought which it was claimed had left many farmers without the means to put their crops in the ground for the next harvest. The legislature had earlier made an unconditional appropriation from the State treasury of $100,000 for the relief of distress arising from the same cause.[90] In Kansas, by an act passed in 1875, counties were in the same way empowered to bond themselves to an amount varying from $5,000 to $20,000 each according to their population and their presumable ability to bear the burden. These bonds were to be known as "relief bonds" and the funds secured in this manner, in each county which voted at a referendum in favor of the outlay, were to be used for the purpose of supplying the destitute with wheat,

[86] *Compiled Statutes* of Nebraska, sec. 472; cf. Howell's *Annotated Statutes* of Michigan, sec. 2259, for a poll of the people in townships on the payment of bounties for the destruction of wolves and panthers.

[87] Session Laws of Kansas, 1871, p. 211 (chap. 91).

[88] *Ibid.*, 1883, chap. 112.

[89] Session Laws of Nebraska, 1891, p. 310 (chap. 41).

[90] *Ibid.*, p. 302 (chap. 39).

corn, oats and potatoes.[91] This too was a measure induced by a drought and it was meant to assist the poor in respect of the next harvest.[92]

In at least two States, Pennsylvania and West Virginia, a very odd system is employed. Sheep farmers are compensated by way of the referendum for injury inflicted upon their flocks by dogs. By a law of 1878 in Pennsylvania the owners of dogs were annually assessed and taxed fifty cents for each male dog and one dollar for each female dog. The sum thus collected in each county was to go into a "sheep fund" from which payments were to be made from time to time to flock-masters to indemnify them for losses traceable to dogs. The amount in damages due any claimant was to be established by appraisers regularly appointed to this task. The surplus remaining in the county treasury after payment of all necessary sums was to be made over to the school treasurers of the various school districts into which the county was divided. The tax was not to be levied in any county, however, until the electors had voted "For the Sheep Law" or "Against the Sheep Law", and a majority of them had accepted the provisions of the act. To avoid the too frequent recurrence of elections the people were to be polled on this subject not oftener than once in two years.[93] Dogs are taxed in the same way in West Virginia, the proceeds being set aside as a fund from which damages will be paid to the owners of sheep whose flocks have suffered from this cause. In forty-six counties of the State the taking effect of the act is made conditional upon a favorable vote of the people at an election "For the Dog Tax" or "Against the Dog Tax". The law when it has once come into operation in any county may be repealed as it was originally adopted by popular vote.[94]

There are not a few instances in which the erection of

[91] *General Statutes* of Kansas, 1889, secs. 1860 *et seq.*
[92] Cf. State ex rel. *v.* Osawkee Twp., 14 Kan. 418.
[93] Session Laws of Pa., 1878, p. 198.
[94] *Code* of West Virginia, 3rd ed., 1891, p. 600.

monuments to soldiers, naval or military heroes and other eminent men is made the subject of a referendum. Thus in Iowa, when a petition which has been signed by "a majority of the members of the Grand Army posts" within any county is presented to the board of supervisors of that county, the proposition to levy a tax to aid in "the erection of a soldiers' and sailors' monument or memorial hall" must be submitted to popular vote.[95] In counties in Ohio when sufficient money has not been privately subscribed for the erection of a monument "in memory of those who died or were killed during the war of 1861" a referendum may be taken on the question of collecting a county tax for this purpose.[96] In Wisconsin, upon a favorable vote of the people, any county board may appropriate a sum not exceeding $10,000 for a monument or other memorial to the soldiers of the Civil War,[97] and any town, city or village in Wisconsin may, by popular vote, determine "to erect a suitable monument or memorial building to the memory of any such residents thereof as may have lost their lives in the military or naval service of the State or United States, or in rendering great State or national service or in consequence of any such service".[98] By a law of 1896 the people of certain cities in Ohio may vote a tax for the erection of a monument to General Anthony Wayne.[99] In the same State a county tax may be laid, by way of a plebiscite, for a "soldiers' library and armory building" for the use of "posts of the Grand Army of the Republic and kindred and auxiliary organizations".[100] By a law of 1869 in New York the legislature extended the right to "the electors of any town at any regular town meeting or of any county at any regular election to vote any sums of money to be designated by a majority of all the electors voting at such town meeting or election for the purpose of

[95] *Code* of Iowa, 1897, sec. 435. [96] *Revised Statutes* of Ohio, sec. 893.
[97] Sanborn and Berryman's Wisconsin *Statutes*, sec. 670.
[98] *Ibid.*, sec. 937.
[99] Session Laws of Ohio, 1896, p. 651; cf. *ibid.*, p. 718.
[100] *Ibid.*, p. 700.

erecting a public monument within such town, or for the county as the case may be, in memory of the soldiers of such town or county or in commemoration of any public person or event ".[101]

In some States the people in their local communities may determine whether they shall pay their " road tax " in money or in labor. To " work out " the tax is a privilege upon which a high value is placed in many rural communities, since it enables the farmers who have few resources besides their tools and implements, their teams and their own muscular strength to escape a money payment. The repairs to the highways are made at a season of the year when the population is not otherwise busily engaged and, under the direction of a locally designated officer, large parties of men who are thus " working out " their tax may be met at certain periods along the American countryside. That the service rendered by a force of men recruited in this way is in the nature of the case quite poor and ineffective is not a conclusive argument in favor of the abandonment of the system in many parts of our democracy. If the system is to be abandoned the taxpayers ask that they shall at least be consulted in regard to the change, a right that they have won in Illinois,[102] Wisconsin,[103] and Michigan,[104]

A rather peculiar referendum is met with in North Carolina. When convicts are employed in work on the public roads they must be fed and maintained in some manner. In a North Carolina county the citizens were lately asked to decide whether a tax should be laid for the benefit of a fund to be used " for the support of convicts and prisoners and persons owing otherwise non-collectible fines " while thus engaged on the roads in the public service.[105]

In the exercise of its benevolent task of caring for the poor

[101] Session Laws of New York, 1869, p. 2056, chap. 855.
[102] Starr and Curtis' *Annotated Statutes* of Illinois, p. 3586.
[103] Sanborn and Berryman's Wisconsin *Statutes*, sec. 776.
[104] Howell's *Annotated Statutes* of Michigan, p. 398.
[105] Public Laws of North Carolina, 1895, p. 350.

the local governments sometimes tax the citizens for the purchase of a hearse and the erection of a vault in order that no one may be without suitable burial. The proposition that a tax shall be levied for either or both of these purposes is submitted to popular vote in townships and villages in Ohio.[106]

A question which is referred to the people of local districts in Ohio with curious frequency is deserving of special remark. This concerns the payment of the claims of officers and magistrates, holding positions of local trust, who have lost the public money by investing it in unsound banks and who have been obliged to make up the amount themselves, or their sureties for them, in order to indemnify the public treasury. For instance a township treasurer, one Alpheus Wilson, had placed $1,642.77 in a bank which afterward failed. When the affairs of the institution were wound up it was found that it could pay to its creditors only 80 per cent. of the amount due them. There was thus a deficit in the accounts of Wilson amounting to $328.55. The State legislature was unwilling to relieve the treasurer and his sureties on its own responsibility, but declared that this would be done in case a majority of the electors of the township voting on the subject should agree to the peculiar proposition. The people voted then "For the relief of Alpheus Wilson—yes" or "For the relief of Alpheus Wilson—no".[107]

In the same year a still more curious case of this kind made its appearance in Ohio. This was a proposal for the reimbursement of a supervisor of highways, one Rodney Prentis, who while in office, it was said, had caused "certain parties to be arrested for leaving dead animals unburied near the highway to the annoyance and discomfort of the public and the detriment of the public health". Later on one of the "parties" in question had instituted a suit at law in a county court against Prentis "for alleged malicious prosecution whereby said Prentis was put to a great expense in de-

[106] *Revised Statutes* of Ohio, secs. 1485 *et seq.*, 2556.
[107] Laws of Ohio, 1896, p. 456.

fending said cause, and while said action finally terminated in favor of said Prentis, he was, by reason of the insolvency of the plaintiff, compelled to pay a large amount of costs in addition to attorney fees to his counsel". The people then were to be polled at a township election to find out whether they would pay a sum not to exceed $400 "to reimburse the Rodney Prentis estate".[108] In another case a referendum was taken in a township in Ohio for the reimbursement of a firm of builders and contractors who were alleged to have sustained a loss of $500 in the construction of a school house.[109] In 1896 alone the legislature of Ohio appears to have passed no less than twelve of these conditional laws for the relief or reimbursement of local officers, or individuals, or firms. This is all a singular commentary on the foresight and talent of local financiers who seem not to be able to adjust matters of this kind without appeals to the State legislature, or else it is an odd feature of the American system of party government devised by the politicians in order that they may keep in the good graces of their lieutenants in rural constituencies, which is much more likely to be the true explanation of the phenomenon.

The referendum is also employed quite frequently in adjusting the salaries of city and other local officers, and in granting pensions to members of the civil service. Thus in Colorado "in cities and towns of not more than 5,000 inhabitants, incorporated under the territorial laws of Colorado or by special charter, the mayor and aldermen, or the trustees in places having such officers, shall not receive any compensation for services rendered by them as such mayor, aldermen or trustees, unless the question of paying such mayor, aldermen or trustees for their services shall first be submitted to the legal voters of such city or town, and unless a majority of those voting thereon shall vote in favor

[108] Laws of Ohio, 1896, p. 673.

[109] *Ibid.*, p. 533; cf. Local Acts of Michigan, 1891, p. 865; *ibid.*, 1893, p. 579.

thereof ".[110] The question of increasing the salary of the Mayor of Hagerstown, in Maryland, was recently submitted to a vote of the people of that city.[111] In New Jersey there are a number of conditional acts of this kind. One refers to the people of cities the question of creating a new office, president of the "board of aldermen, common council or council" who is to receive in salary half as much as the mayor of the same city;[112] others, the question of increasing the compensation of employees of the fire department;[113] others of increasing the pay of persons engaged in the city police service.[114] In New Jersey, too, the people of cities may determine whether pensions shall be granted to police officers and policemen who have reached a certain age and have been in the service of the city for a period of twenty years.[115] In the cities of Missouri the people may decide whether or not pensions shall be paid to policemen who may have sustained injuries while on public duty.[116] In any town in the State of New York teachers who have taught continuously in the public schools for a period of twenty-five years or more may receive monthly payments from a pension fund, if the taxpayers of the town shall vote in favor of making them such compensation.[117]

An annual budget to take the place of the great number of separate appropriation bills, putting science and system into a field where only disorder has reigned hitherto, is gradually making headway in the local governmental practice of the different States. Where this reform has been introduced the referendum is often applied as a kind of penalty on all appropriation bills which the council or board of government has neglected to include in the general budget. Thus in North

[110] Mills' *Annotated Statutes* of Colorado, 1891, sec. 4537.
[111] Session Laws of Maryland, 1894, p. 151.
[112] *General Statutes* of New Jersey, p. 500.
[113] *Ibid.*, pp. 1506, 1519, 1524, 1558.
[114] *Ibid.*, pp. 1536, 1537, 1543, 1545, 1557. [115] *Ibid.*, p. 1537.
[116] Session Laws of Missouri, 1895, p. 236.
[117] Banks and Brothers' *Revised Statutes* of New York, 9th ed., p. 3089.

Dakota, with respect to cities, it is provided that there shall be an "annual appropriation bill" covering all necessary subjects, and that "no further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city either by a petition signed by them or at a general or special election duly called for that purpose".[118] Similar provisions occur in the statutes of South Dakota,[119] Nebraska,[120] Illinois,[121] and Michigan.[122] An interesting exception to the general prohibition is met with in Illinois where upon a two-thirds vote of the council or legislative board in any city or village an appropriation bill may be passed definitively and without a poll of the people, if the money which it carries with it is intended for improvements rendered necessary by a "casualty or accident happening after such annual appropriation is made".[123]

In the school administration a prolific field is afforded for the development of the referendum. The progress which has been made in introducing the people as direct agents in legislation, in the specially organized school districts and other local governmental subdivisions with which the responsibility for public education rests, is very noteworthy. At a very early time, it having been recognized that gratuitous schooling of the masses the cost of which was to be borne by the taxpayers, was a rather unusual exercise of public power, the people were asked to declare whether they were in favor of such an extension of local functions. And from the beginning onward in the erection of new school buildings, the introduction of new equipment and new and higher courses, the increase of the length of the school term and other proposals which are made from time to time to improve the public school system, involving as they all do a free ex-

[118] *Revised Codes* of North Dakota, sec. 2262.
[119] Laws of 1890, p. 89. [120] *Compiled Statutes*, p. 196.
[121] Starr and Curtis' *Statutes*, p. 726. [122] Local Acts of 1891, p. 134.
[123] Starr and Curtis' *Statutes*, p. 726.

penditure of public money, the taxpayers are called upon to give their assent before fresh financial obligations are incurred. Thus as early as in 1825, when it was a question of establishing a general system of free primary schools in Maryland, the local option principle was made use of. The electors of each county of the State when they next voted for delegates to the General Assembly were to declare (it would appear *viva voce*) whether they were for or against the establishment of these schools. The act was to become operative only in counties in which a majority of the votes cast on the proposition were in favor of the schools; in other counties remaining void and of no effect.[124]

Likewise in Pennsylvania by an act, passed by the State legislature in 1836, "to consolidate and amend the several acts relative to a general system of education by common schools" every township, borough or ward in the State was constituted a separate "school district", the officers of which could tax the inhabitants and exercise other functions. In each district, each year until a favorable majority should be secured for the proposition, the citizens were to deposit their ballots marked "Schools" or "No Schools" in the boxes at the polling booths. In districts in which the proposition had been de-

[124] Laws of Maryland for 1825, chap. 162, "An act to provide for the public instruction of youth in primary schools throughout this State". The last two sections of the act were as follows: "Sec. 29, Be it enacted that at the next election of delegates to the General Assembly every voter, when he offers to vote, shall be required by the judges of election to state whether he is for or against the establishment of primary schools and the said judges shall record the number of votes for and against primary schools and make return thereof to the legislature during the first week of the session and if a majority of the said votes in any county shall be in favor of the establishment of primary schools, as is therein provided for, then and in that case the said act shall be valid for such county or counties, otherwise of no effect whatever.

"Sec. 30. And be it enacted that if a majority of the votes of any county in this State shall be against the establishment of primary schools as established by this act then and in that case the said act shall be void as to that county." This law led to one of the most important of the early judicial opinions on "local option" measures. Cf. Burgess *v.* Pue, 2 Gill. 11.

feated, the people might vote on it again a year later. Districts which in any year should adopt it could retrace their steps and discontinue the system upon a vote of the people in 1837 and every third year thereafter. Where the people had declined to assume the increased obligations children whose parents could not afford to educate them privately were still, however, at this comparatively late period in the State's history not brought up in total ignorance, but were sent to school under a more economical system in obedience to the terms of "an act to provide for the education of the poor gratis".[125] Nevertheless such a law gave to those children who availed themselves of this opportunity to obtain a free schooling, a rather opprobrious position in the community as paupers and dependents, and was far from being a general system of public education which the law of 1837 contemplated and which has since been the outgrowth of these modest beginnings.[126]

[125] Cf. Acts of Assembly of Pa., 1808-9, chap. 114; Acts of Assembly, 1835-36, p. 525, sec. 16.

[126] The law of 1836 in Pennsylvania which is to be found in Pa. Acts of Assembly of that year, No. 166, p. 525, sec. 13, says: "The school directors of every school district which shall not have adopted the common school system shall annually call a meeting of the qualified citizens of the district on the day of election for directors to be held at the usual place of holding township, ward or borough elections by at least six advertisements put up in the most public places in the district for the space of two weeks; and the said meeting shall be organized between the hours of one and four o'clock P. M. on the said day, by appointing a President and the secretary of the board of directors, or in his absence some other member of the board shall perform the duties of secretary to the meeting; when the meeting is so organized the question of establishing the common school system in the district shall be decided by ballot and the said president and secretary shall perform the duties of tellers to the meeting and shall receive from every person residing within the district qualified to vote at the general election a written or printed ticket containing the word 'Schools' or the words 'No Schools' and shall continue without interruption or adjournment until the electors who shall come to the said election shall have opportunity to give in their respective votes and the said tellers shall count the votes and if a majority shall contain the word 'Schools' the secretary shall certify the same to the board of directors of the district who shall proceed to establish schools therein agreeably to the provisions of this act, but if a majority shall contain the words 'No Schools' the secretary shall certify the same to the county com-

This referendum with respect to school taxes made its appearance at about the same time in other States of the Union. The "Free School Law" which was submitted to the people of the State by the legislature of New York in 1849, leading to that notable judicial opinion in Barto *v.* Himrod,[127] furnishes additional evidence that public expenditure on account of the public schools was early regarded as a suitable subject for a popular vote.

Throughout all the later stages of the development of our system of public education into its present form the people have continued to figure extensively as a law-making agency. There is a polling of the citizens of local districts in reference to the collection of taxes which are to be used to supplement the appropriations for general school purposes received from the treasury of the State. Thus in Arkansas a plebiscite is taken in school districts at the instance of the county court to determine what rate, not in excess of five mills on the dollar, shall be levied "for the support and maintenance of public schools". This tax would appear to be in benefit of a local fund for general school purposes, and is not to be allocated to any special line of educational work. If the people should refuse to vote this money to the school administration it is to be presumed that public schools would still exist within the district, though their efficiency would not be so great.[128] A

missioners of the proper county; and the school directors of every school district which may have adopted the common school system may, if they deem it expedient, call a meeting of the qualified citizens of the district on the first Tuesday in May in the year 1837 and on the same day in every third year thereafter, to be held at the usual place of holding township, ward or borough elections, at which time and place an election shall be held to decide by ballot whether the common school system shall be continued or not; the notice for holding said elections to be in conformity with the preceding part of this section; and should there be a majority of the taxable inhabitants of said district in favor of 'No Schools' the secretary shall certify the same to the county commissioners of the proper county and the operation of the common school system shall be suspended in said district until such time as a majority of the citizens shall otherwise decide."

[127] 4 Seld. 483.

[128] Sandels and Hill's *Digest* of the Statutes of Arkansas, 1894, sec. 6416; cf. Constitution of Arkansas, art. xiv, sec. 3.

supplementary tax for school purposes may be voted by the people of local districts in Georgia.[129] In Florida, Texas, West Virginia, Kentucky and Missouri there are local elections on the subject of levying taxes which are to supplement the appropriations from the State school fund and place larger sums at the disposal of school officers with a view to raising the standards of instruction and increasing the efficiency of this branch of the public administration.[130]

It will be noted by all who will stop to examine into this subject that a poll of the people in regard to school levies, with its attendant uncertainties, still finds favor to-day only in those sections where the common school system has not yet been established on very firm foundations. Where the poverty of the people and their general heedlessness in regard to education is so great that the State legislature hesitates to lay the tax definitively and fix upon its amount, the referendum is an institution whose intrinsic value will not greatly impress any competent student of political forms. It is here a mere device by which the representatives of the people in a democracy are enabled to escape their just share of responsibility.

Furthermore there are referenda with specific ends in view respecting the public school administration, as for instance, on the subject of the purchase of land upon which to erect school buildings, the construction of these buildings and the equipment of the same.[131] As the charges on school account are

[129] *Code* of Georgia, 1895, secs. 1309 *et seq.*; cf. Constitution of Georgia, art. viii, sec. 4. The ballots are to contain the words "For local taxation for public schools" or "Against local taxation for public schools".

[130] Constitution of Florida, art. xii, sec. 10; Constitution of Texas, art. vii, sec. 3; Sayle's *Civil Statutes* of Texas, 1888, art. 425a; *ibid.*, art. 3733 *et seq.*; supplement to Sayle's *Civil Statutes*, 1888 to 1893, art. 3730; *ibid.*, 3733a *et seq.*; *Code* of West Virginia, 3rd ed., 1891, p. 361; Barbour and Carroll's Kentucky Statutes, secs. 4457 *et seq.*; Constitution of Missouri, art. x, sec. 11.

[131] Sayles' *Civil Statutes* of Texas, 1888, sec. 3733; Laws of California, 1891, p. 264; *ibid.*, 1893, pp. 249, 263, 267; Starr and Curtis' *Annotated Statutes* of Illinois, pp. 3689, 3692; *Code* of Mississippi, 1892, sec. 3014; Montana *Codes*, 1895, Vol. I, secs. 1940, 1962; Constitution of Colorado, art. xi, sec. 7.

in some measure proportionate to the number of months in the year school is kept, this subject in many communities is also left to the decision of the whole electorate. If the taxpayers desire it teachers will be employed for a longer time and the pupils can therefore be given a more thorough training at the public expense. With increased funds the standards can be raised, the instruction improved and the results will be very much better as measured by the mental development of the children. Although such a subject, in common with most others affecting public education, would seem to be one which the people *en masse* are not well qualified to deal with, they are often called in to say yes or no on grave questions of this character. Pecuniary considerations in local districts, where men reside to whom education is a name, instead of an experience, are likely to operate actively to prevent the development of an enlightened policy in regard to schools. For instance, in West Virginia it appears that the legislature makes it compulsory for a district to keep school during only four months out of the twelve. On the initiation of the "Board of Education", or on the petition of twenty voters of any district, the question of extending this period must be submitted to popular vote. The electors who favor the increase of time are to vote "For —— months school", the number desired being supplied, and those opposed to the extension of the period "Against more than four months school".[132] This referendum occurs in a number of States. In Illinois it is not lawful in any township "for a board of directors to levy a tax to extend schools beyond nine months without a vote of the people".[133]

With the development of the public school system the idea has gained ground that text books should be supplied free of cost to the pupils. Since this policy increases the expense of administration the specific question of free text books is

[132] *Code* of West Virginia, 1891, p. 382; cf. Session Laws of West Va., 1897, pp. 169, 172.

[133] Starr and Curtis' *Statutes* of Illinois, p. 3689; cf. Kentucky *Statutes*, secs. 4457 *et seq.*

sometimes referred to the electors in counties and school districts, as in South Dakota,[134] Montana[135] and other States.

As the school term is increased in length, new courses being added and the standards of instruction heightened, the demand arises for graded schools. Effective results were not to be secured, especially in cities and towns where there are many pupils to be taught, by confining all the children in one room or even in one building and bringing them all before the same teacher or teachers. The "High School" soon made its appearance in our public educational scheme. In cities it now exists almost everywhere and there are sometimes county high schools and township high schools, which are maintained at places in the county or township convenient to the students who are entitled to receive free instruction in rural districts. In many parts of the country, however, it is not regarded as an indispensable feature of the school administration, and, since the establishment of a graded system means the outlay of a considerable sum of money, the question is submitted to popular vote. In some cases townships and other local districts, which could not separately afford so great an outlay, unite to establish and maintain high schools. They then use them jointly. The local referendum in respect of high schools occurs in Iowa,[136] California,[137] West Virginia,[138] Illinois,[139] Kansas,[140] Kentucky,[141] Nevada,[142] Wisconsin[143] and other States.

Similarly in the establishment of schools of a still higher or of a special character the public money is sometimes ap-

[134] Session Laws of 1891, p. 237.
[135] Session Laws of 1897, p. 61.
[136] *Code* of Iowa, 1897, sec. 2728.
[137] Laws of California, 1891, pp. 57, 182; *ibid.*, 1893, p. 268.
[138] *Code* of West Virginia, p. 371.
[139] Starr and Curtis' *Statutes*, p. 3660.
[140] Webb's *General Statutes* of Kansas, chap. 64, secs. 1 *et seq.*
[141] Kentucky *Statutes*, sec. 4464; cf. *ibid.*, 4487, for a peculiar plebiscite in which only negroes vote on the question of establishing a graded school for colored children.
[142] *Statutes* of Nevada, 1895, p. 28.
[143] Sanborn and Berryman's *Statutes*, 1898, p. 384.

propriated subject to the popular approval. The Constitution of Kentucky says: "No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters and the majority of the votes cast at said election shall be in favor of such taxation".[144] In Illinois, in such counties as have not yet taken up township organization, the question of founding and maintaining a county "Normal School", in which to educate and fit teachers for their profession, is submitted to popular vote. In other counties in Illinois representative officials may act upon their own initiative in the establishment of such schools.[145] In North Carolina by a law of 1891, elections were authorized in cities and towns in respect of a subscription of money to a newly established "Normal and Industrial School for White Girls",[146] and in South Carolina similar subscriptions might be made on authority of the people of counties, cities or towns in benefit of a branch of the State University to be known as "The Winthrop Normal and Industrial College of South Carolina".[147]

Akin to this referendum on school questions is another in respect of public libraries. The free library as a government establishment is a still later development than the free school. The value of rooms to which the people may freely go in order to read, and of loan libraries, from which they may take out books to peruse them at their leisure in their homes, is in many communities not fully understood. Where such advantages are appreciated it is often felt that it may be left to private benefactors to supply the people with library facilities. As in respect of universities and establishments of higher learning when private donations are forthcoming the government is disinclined to enlarge its sphere and add to its obligations. In many communities in which it is pretty well recognized that a public library would be a desirable thing there is fear that

[144] Constitution of Kentucky, sec. 184.
[145] Starr and Curtis' *Statutes*, p. 3733.
[146] Session Laws of North Carolina, 1891, p. 126.
[147] *Revised Statutes* of South Carolina, 1894, Vol. I, p. 397.

the taxpayers would not care to be charged with the expense and thus in cities, towns, townships and other local districts the referendum comes into play. In Illinois when a petition which bears the signatures of fifty or more legal voters is presented to the officers of any incorporated town, village or township requesting that an election be held to determine whether a tax not exceeding two mills on the dollar shall be levied therein for establishing and maintaining a free public library the proposition must be submitted to popular vote.[148] The same question is referred to the people of local districts in many other States as in Iowa,[149] Kansas,[150] Michigan,[151] Minnesota,[152] Missouri,[153] New Jersey,[154] New York,[155] Ohio,[156] and Utah.[157] In New York the people of local districts may vote upon the question of appropriating a sum of money in aid of private libraries on the condition that these libraries shall be kept open for the public's free use.[158]

[148] Starr and Curtis' *Statutes*, p. 2531.
[149] *Code* of Iowa, sec. 727.
[150] Webb's *Statutes*, chap. 39, sec. 28, and chap. 42, sec. 53.
[151] Howell's *Annotated Statutes*, 1882, p. 1362.
[152] *Statutes* of Minnesota, 1894, sec. 1425.
[153] Session Laws, 1897, p. 50.
[154] *General Statutes*, 1896, pp. 1950, 1953 and 1956.
[155] Banks and Brothers' *Revised Statutes*, 9th ed., p. 1490.
[156] *Revised Statutes* of Ohio, sec. 1476.
[157] Laws of 1896, p. 144.
[158] Banks and Brothers' *Revised Statutes*, p. 1490.

CHAPTER XI

THE LOCAL REFERENDUM—LOAN BILLS AND FINANCIAL PROPOSALS—CONTINUED

THERE is a tendency constantly at work among municipalities and other local governments impelling them to increase the public indebtedness excessively. With a view to the prevention of overissues of bonds, extravagant expenditures and too free a use of the taxing power, the constitutional conventions, as I have noted already, not infrequently take the matter in hand. Definite limits are established beyond which local governments may not go in debt-making and these provisions are often of a general character applying to all forms of indebtedness, no matter what the specific purpose of the loan. As a method of applying restraint to the local councils and boards, and the State legislatures as well, since the latter might give too much play to the communities in this particular, we have gone behind these agents and have put our prohibitions in the constitutions. One of the most thoroughgoing of these constitutional provisions, in so far as the referendum has been employed and has become a feature of the plan, occurs in the Constitution of North Carolina. This provision is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified electors therein".[1]

In Colorado no city or town may make a loan of any amount whatsoever except for the purpose of securing a suitable water supply for the citizens until the proposition shall first have been approved by popular vote. The aggregate amount of

[1] Art. vii, sec. 7.

the outstanding debt of any such municipality shall never exceed a sum equal to three per cent. of the assessed valuation of its taxable property.[2] In Louisiana, likewise, all propositions to "incur debt and issue negotiable bonds therefor" must be submitted to popular vote and, being approved by the people, loans may be contracted "to the extent of one-tenth of the assessed valuation of the property within said municipal corporation, parish, drainage district", etc.[3] In West Virginia counties, cities and other local districts may incur indebtedness with the approval of the people, but in no case may the aggregate amount of such indebtedness be in excess of five per cent. of the assessed valuation of the taxable property in these districts.[4]

In some States the provisions on this subject are not quite so far-reaching. Within certain limits local officers may contract debt at their own pleasure. It is only when these limits are passed that the referendum is employed. Of these various provisions the most usual is that which restricts the local governments in the creation of debt in any one year to a sum not exceeding "the income and revenue for that year". Expenditures or loans for any purpose in excess of this amount are made illegal, except with the approval of the people, by the Constitutions of six States,—California,[5] Utah,[6] Kentucky,[7] Idaho,[8] Missouri,[9] and Wyoming.[10] In Pennsylvania the debt of municipalities and other local districts is definitely limited at seven per cent. of the assessed valuation, in special cases at ten per cent. Under no circumstances shall the debt be allowed to pass this limit, and every proposition to increase it to a point beyond two per cent. of the assessed valuation in any district must have the approval of the people.[11] In the local districts of Georgia proposals to

[2] Art. xi, sec. 8. [3] Constitution of Louisiana, art. 281.
[4] Constitution of West Virginia, art. x, sec. 8; cf. Constitution of South Carolina, art. viii, sec. 7.
[5] Art. xi, sec. 18. [6] Art. xiv, sec. 3.
[7] Sec. 157. [8] Art. viii, sec. 3.
[9] Art. x, sec. 12. [10] Art. xvi, sec. 4.
[11] Constitution of Pennsylvania, art. ix, sec. 8.

create a debt in excess of one-fifth of one per cent., but not higher than seven per cent. (in special cases ten per cent.) of the assessed valuation must be submitted to popular vote;[12] in the State of Washington beyond one and a half per cent. but not exceeding five per cent. (ten per cent. in special cases).[13] In Montana "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding $10,000 without the approval of a majority of the electors thereof voting at an election to be provided by law".[14]

In West Virginia county officers are put under restraint in the assessment and collection of taxes. Except for a few purposes which are enumerated in the Constitution, taxes in excess of 95 cents per $100 of valuation in any one year must be authorized by popular vote.[15] In the counties of Illinois the limit is 75 cents per $100 of valuation and proposals for a higher tax rate must be approved by the people.[16] The same referendum occurs in counties in Nebraska, when it is a question of making the rate higher than $1.50 per $100 of the assessed valuation.[17]

The loan bill and bond elections are very familiar in cities and other local political districts in all parts of the United States. While the people are, in general, a rather effective restraining influence upon officers who might otherwise heap up indebtedness inordinately, they are not a certain safeguard. They have a habit of forgetting one year what loans they have authorized the year before, and are in no sense well fitted to judge when a community's bonded debt is overstepping the limit which prudent financiers would establish for it. A city's population, its resources and its ability to meet its obligations conveniently are not far from fixed quantities. That the people know nothing of all this need not be said. They do not know how much debt has been voted before, what

[12] Constitution of Georgia, art. vii, sec. 7.
[13] Constitution of Washington, art. viii, sec. 6.
[14] Constitution of Montana, art. xiii, sec. 5.
[15] Constitution of West Virginia, art. x, sec. 7.
[16] Constitution of Illinois, art. ix, sec. 8.
[17] Constitution of Nebraska, art. ix, sec. 5.

provision has been made for meeting it as it falls due, or how much in safety the district could properly carry. The constitutional conventions recognize this fact in a general way when they fix definite limits to the debt as, for instance, five per cent. or seven per cent. of the assessed valuation.

When the voters of a city are asked to assent to a loan of one, or five, or twelve million dollars, they in the best case consider how it is to be expended, as for instance, for free libraries, new streets or an improved water supply. If they individually feel the need of these improvements and have reason to think that their lot will be made more happy thereby they are very likely to vote for the loan. Often no considerations as good as these are at hand. At a recent election on the question of borrowing a large sum of money in Philadelphia, to be applied to improvements in different parts of the city, purely local and selfish considerations made themselves felt. Those parts of the city which were to be directly benefited by the loan returned large majorities for it while in other sections it was viewed with curious indifference. Not a few electors who, upon being asked how they had voted on the proposition, explained in all seriousness that they had cast their ballots in favor of the bill because they believed it would put more money in circulation and give the poor a chance to secure some of it. The professional politicians are usually to be found on the side of a loan bill for they know that whenever a large sum of money is to be paid out by the city, for no matter what purpose, there will be opportunities for them and their friends to enrich themselves at the public expense.

However, one rather important distinction must be noted. While the average voter cares very little whether his city has a debt of $10,000,000 or $100,000,000, since he does not aggravate himself with a thought of how it is eventually to be paid, he as a rule approaches a proposition to increase the tax rate in a very different frame of mind. It is of course true that every loan means a heavier burden of taxation, if not at once, at some future time. The postponement of the evil day

is however very seductive to the taxpayer. He will look on indifferently while bonds are issued in large sums but it is another matter altogether when a direct proposal is made to him for an increase of the tax rate, say, from $1 to $1.25 on each $100 of the assessed value of his property. No matter how good the purpose for which the additional revenues are needed taxpayers will vigorously resist this open attempt to induce them to make over a larger portion of their substance to the " state ".

As with other referenda, so with these in respect of financial subjects, a majority of the votes cast on the proposition is usually decisive. The approval of a larger number of electors, as two-thirds, must however be secured to validate any increase in the local debt in some of the States, where it is desired to make the conditions more difficult in order the better to protect the public credit.

(3.) Coming finally to the last sub-class of the referenda upon financial subjects in local communities we find that the people are sometimes consulted, too, with respect to the sale or lease of property which is vested in, or is commonly held by them in a corporate political capacity. The citizens have voted in many cases to determine whether they shall be taxed to acquire this property; they are now to decide whether it shall be sold or otherwise alienated by the community. In the former case there was a mixture of sentiments inducing the referendum, the chief of which was a fear lest the people disapprove of the new taxes that may be laid perhaps for rather questionable purposes, and will later vote to retire from office those who have imposed these charges upon them. If the people can be made to incur these obligations themselves at their own instance and on their own responsibility representative officers may escape much unpleasant blame. But in the case of a referendum on the sale of lands and other public property the controlling motive seems to be another. Here, as with a poll of the people on the question of granting franchises and concessions to private water and lighting companies in cities, the people are introduced as a brake upon the

local councils and boards which are too prone inconsiderately to dispose of valuable holdings of this kind.

More jealously guarded than some other forms of public property are the "school lands" which the Congress of the United States, in pursuit of its policy with respect to the public lands, made over to the States for the benefit of education. "Section number 16" in each township was regarded as school land and when this section was not available for the grant equivalent transfers were made to the State. This land was vested in the townships, each holding its share for the use of its common schools, and it was sometimes a condition of the grant that neither the section nor any part of it should ever be sold except with the consent of the inhabitants. Thus by the act of Congress of February 15, 1843, in reference to the school lands of Illinois, Arkansas, Louisiana and Tennessee it was provided that these lands in any township "shall in no wise be sold without the consent of the inhabitants of such township or district to be obtained in such manner as the legislatures of said States shall by law direct".[18]

Two methods have been employed with the object of securing the assent of the people to a sale, the petition and the referendum. Thus in Illinois[19] and Arkansas[20] the popular sense regarding this question is secured by circulating a petition for the signatures of the citizens; while in Indiana,[21] Ohio,[22] Alabama,[23] and Louisiana,[24] a vote of the people of the township at a referendum, in which the ballots bear the words "Sale" or "No Sale", or their equivalents, is requisite.

The people are sometimes directly consulted also in regard

[18] United States *Statutes at Large*, Vol. V, p. 600.
[19] Starr and Curtis' *Statutes*, p. 3719.
[20] Sandels and Hill's *Statutes*, secs. 7114 *et seq.*
[21] Horner's Indiana *Statutes*, secs. 4329 *et seq.*
[22] *Revised Statutes* of Ohio, secs. 1418 *et seq.*
[23] *Code* of Alabama, secs. 3635 *et seq.*
[24] Wolff's *Revised Laws* of Louisiana, sec. 2958; cf. Telle *v.* School Board, 44 La. An. p. 365.

to the lease of school lands, as in Indiana.[25] This referendum has found its way into the Constitution of at least one State, Kansas.[26]

Public property of other kinds—not lands—is sometimes vested in the people of a community in this special manner, a legal sale being possible only after a petition requesting that this course shall be taken, has been signed by a large number of the inhabitants, or an election is held and the people vote in favor of the sale. In the counties of Kansas poor asylums or poor farms which represent a value in excess of $3,000 may be sold or leased only by way of the referendum.[27] In Missouri in cities of the "first class" the "municipal assembly" may pass an ordinance for the sale or lease of "any of the parks, places or squares" of the city. However "no such sale or lease shall be made by the municipal assembly unless the ordinance providing therefor be submitted to a vote of the qualified voters of the city for ratification at a general election, and be ratified by a majority of the qualified voters of the city".[28] Any township in Ohio may sell "real estate or buildings which it does not need", if the people of the district indicate their approval of the policy.[29] An act passed by the legislature of Ohio in 1887 authorized a poll of the people in the city of Cincinnati on the question of selling a line of railway which had been under the ownership and control of the commonalty.[30]

[25] Horner's Indiana *Statutes*, sec. 4329; cf. Acts of Tennessee, 1889, p. 72.
[26] Constitution of Kansas, art. vi, sec. 5.
[27] Webb's *Statutes* of Kansas, chap. 156, sec. 37.
[28] *Revised Statutes* of Missouri, 1889, p. 348.
[29] *Revised Statutes* of Ohio, sec. 1481.
[30] *Ibid.*, sec. 9868.

CHAPTER XII

THE LOCAL REFERENDUM—LOCAL OPTION LIQUOR LAWS AND VEXED QUESTIONS

We have arrived now finally at the third and last general class in the scheme which was originally mapped out for the discussion of this subject. In this class are embraced the referenda on vexed questions of various kinds regarding which the people hold very opposite opinions and are likely violently to disagree. I have noted in my remarks concerning some of the earlier classes of local referenda, more particularly those on financial questions, that many of these proposals are essentially of a disagreeable and vexing character. The legislature hesitates either to enact or to refuse to enact a certain measure. It would be criticized by partisans no matter what policy it should adopt. The legislators say then to the people: "We will refer this question to you. You elect us and we represent you. In this matter we will submit the law directly to you and if you are in favor of it you may pass it; if, however, you are opposed to it you will reject it. In any case you cannot blame us."

The most familiar type of conditional legislation of this kind in local communities relates to the control and prohibition of the traffic in intoxicating liquors. In the local districts, as in the States, the referendum in respect of this subject enjoys a wide application and it has been in common use for more than fifty years. This local veto, a majority of the electors in a county, a township or a borough having the power to decide whether or not liquors shall be sold therein, has come to be looked upon as an almost necessary feature of American government. It is generally approved by writers

on constitutional subjects and by the courts, and lacking this method it would be difficult to suggest another which would be so satisfactory to great bodies of the people who are the bone and sinew of the American democracy. Whether an attempted regulation of the habits of men with respect to what they eat and drink is a perilous attack on individual rights without which no society can have native strength and original purpose, or whether it is not, there is a general disposition to say to the drinker or the dram seller on the one side that he must conform to the wishes of the majority, and to the teetotaler and the reformer of mankind on the other that he must do the same thing. Constitutional thinkers familiar with our practice will remark, whether they are individualists or advocates of state intervention, that a community has the undoubted "right" to prohibit the sale of liquors inside its borders, if the people at a plebiscite express their approval of this policy. Such a community is held to possess the "right", even without a direct vote of its inhabitants in favor of prohibition, in the regular exercise of the police power. Through its appointed agents liquor selling may be restricted by the local corporation; it may also be forbidden, but the latter is a course which the legislature on its own responsibility will rarely authorize the officers of a county, a township or other local district to pursue until public sentiment shall become much more nearly unanimous than it is to-day.

The referendum affords a most convenient way out of a disagreeable predicament, for by our "local option" system a "general law" may be enacted by the legislature and may stand upon the statute book permitting a vote of the people whenever certain conditions shall be fulfilled, and it still remains there even though not a single district in the State has chosen to avail itself of the privilege. It enforces or repeals itself automatically according as the sentiment of the electors with the passage of time may undergo change regarding this question. A more elastic form of legislation it would be hard to devise, and a more ingenious method of escape from the bitter attacks of the teetotalers on the one hand and of the users

of liquors and the publicans on the other can scarcely be conceived. It is pleasant to encounter the hostility of neither faction, as politicians in this country very well know, and the temperance "campaigns" draw political lines so closely and divide social classes so sharply that any device by which a legislator may pass the charge of bias or bad faith back again to the people, from whom it emanates, finds a cordial welcome. Out of such conditions the "local option" principle with respect to subjects of this kind in this country has been a natural development.

One of the earliest of the local option laws in reference to the sale of liquors which I have been able to find was passed by the legislature of the State of Pennsylvania in 1846. There were probably local option liquor laws applying to single and separate counties prior to that time, but this date marks with approximation the beginning of the history of this referendum in the United States. The Pennsylvania law of 1846 took into account no larger units than boroughs, wards of cities and townships and these only in some eighteen counties, the names of which were distinctly specified. The elections were to be annual commencing with 1847. The ballots were to contain the words "For the sale of liquors" or "Against the sale of liquors". If a majority of the votes cast on the proposition were in favor of the sale, inns and taverns were to be licensed as they had earlier been; if, however, a majority of the votes cast were against the sale the traffic would be declared to be a "public nuisance" and it would be prohibited and penalized.[1]

A similar law, of application to the separate counties of Delaware, was passed by the legislature of that State in 1847. The people in that year and at any subsequent annual election, when a number equal to one-fourth of those voting at the last preceding election should request it in writing, were to deposit ballots bearing the words "License" or "No License" in "a box provided for that purpose". In any county voting

[1] Session Laws of Penna., p. 248; cf. *ibid.*, p. 431.

"No License" the sale of alcoholic beverages became, *ipso facto*, a punishable offense.[2]

From this time forward "local option" laws on the subject of liquor licenses gained ground rapidly and steadily despite occasional unfavorable opinions from the State supreme courts. To-day there are such laws in perhaps half the States of the Union, the system having met with much favor in the South where it has spread irresistibly. There are "License" and "No License" elections also in New England, notably in Massachusetts and Connecticut, where the principle has the support of a public sentiment which is as intelligent as any in the United States.

In three States, Florida, Texas and Delaware, this referendum is guaranteed to the people in their local communities by the Constitutions. Thus in Florida the Constitution provides as follows: "The Board of County Commissioners of each county in the State, not oftener than once in every two years, upon the application of one-fourth of the registered voters of any county, shall call and provide for an election in the county in which application is made to decide whether the sale of intoxicating liquors, wines or beer shall be prohibited therein, the question to be determined by a majority vote of those voting at the election called under this section," etc.[3]

The Constitution of Texas prescribes that "the legislature shall at its first session enact a law whereby the qualified voters of any county, justice's precinct, town, city or such subdivision of a county, as may be designated by the commissioners' court of said county, by a majority vote from time to time may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits".[4]

The new Constitution of Delaware declares: "The Gen-

[2] Session Laws of Delaware, p. 178. This law was declared unconstitutional by the State Court of Errors and Appeals in the notable opinion Rice *v.* Foster, 4 Harr. 479.

[3] Constitution of 1885, art. xix, sec. 1.

[4] Constitution of 1876, art. xvi, sec. 20.

eral Assembly may from time to time provide by law for the submission to the vote of the qualified electors of the several districts of the State, or any of them mentioned in section 2 of this article [*i. e.*, four districts,—Sussex county, Kent county, the city of Wilmington and the rural and remaining portions of New Castle county, the State containing only three counties] the question whether the manufacture and sale of intoxicating liquors shall be licensed within the limits thereof; and in every district in which there is a majority against license no person, firm or corporation shall thereafter manufacture or sell spirituous, vinous or malt liquors, except for medicinal or sacramental purposes within said district, until at a subsequent submission of such question, a majority of votes shall be cast in said district for license." The Assembly *must* submit the prohibition question in any district whenever a majority of the members of each house of the legislature of Delaware for that district request that an election shall be held on this subject.[5]

General local option liquor laws are to-day to be found on the statute books of the following States: Arkansas, Connecticut, Florida, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, North Carolina, Ohio, South Dakota, Texas, Virginia, and Wisconsin. Such laws have earlier been in force in other States but have now been repealed. Furthermore many States to-day have special laws authorizing a plebiscite on this subject in separate local districts, as New Jersey, Pennsylvania, Colorado, Alabama, West Virginia and Maryland. In several States, too, general and special laws exist side by side.

Concerning the general laws it may be noted that some apply to counties, and others only to smaller districts—subdivisions of counties. There is local option with the county as the unit in Arkansas,[6] Florida,[7] Georgia,[8] Michigan,[9]

[5] Constitution of 1897, art. xiii, sec. 1.
[6] Sandels and Hill's *Digest* of Arkansas Statutes, p. 1115.
[7] *Revised Statutes* of Florida, p. 329. [8] *Code* of Georgia, sec. 1541.
[9] Howell's *Annotated Statutes*, Supplement 1885-1890, pp. 3173 *et seq.*

Mississippi,[10] Montana.[11] There is local option in the counties, and as well and at the same time in the cities, towns, precincts, wards and other constituent parts of counties in Kentucky,[12] Missouri,[13] North Carolina,[14] Texas,[15] and Virginia.[16] There is local option on this subject in towns, townships and in districts smaller than the county only, in Connecticut,[17] Massachusetts,[18] Minnesota,[19] New York,[20] and Wisconsin.[21]

A method employed rather generally in the South, where the county is the chief territorial unit for purposes of local government, makes it possible for election districts and precincts to secure "prohibition" even though the whole county and the contiguous districts in the same county vote "for license". It is provided that when the people of the entire county, that is of all the election precincts added together, shall vote against the sale of liquors then none shall be sold in any part of the county. However, if the vote of the people of the entire county shall be "for the sale" there may still be no licenses granted in such precincts of the county as have returned majorities for prohibition. This is a saving feature of the law in Arkansas, Florida, North Carolina, Texas, and Virginia, which appears to indicate that it was framed in the interest of the temperance element rather than of the "saloon keeper". The legislature, though desiring to avoid any appearance of friendliness or unfriendliness to either party, here seems to err on the side of those who would close the inns and

[10] *Code* of Mississippi, secs. 1609 *et seq.*
[11] *Political Code*, secs. 3180 *et seq.*
[12] Barbour and Carroll's Kentucky *Statutes*, secs. 2554 *et seq.*
[13] *Revised Statutes* of Missouri, p. 1050.
[14] *Code* of North Carolina, secs. 3113 *et seq.*
[15] Supplement to Sayles' *Civil Statutes*, 1888 to 1893, Title 63, art. 3227.
[16] *Code* of Virginia, 1887, p. 200.
[17] *General Statutes*, 1888, sec. 3050.
[18] *Public Statutes* of Massachusetts, 1882, pp. 524-25.
[19] *Statutes* of Minnesota, 1894, secs. 1266, 1990.
[20] Laws of 1896, p. 57; cf. *ibid.*, 1897, p. 216.
[21] Sanborn and Berryman's Wisconsin *Statutes*, sec. 1565a.

drinking shops since a rule is adopted which does not "work both ways". If the county votes "no license" the sale of liquors is prohibited everywhere. If the vote is "for license" the trade is permitted only in such precincts of the county as have given local majorities in favor of the traffic.[22]

It is interesting to observe with what limit of frequency these local option elections may be held. In some States the laws contain no specific restrictions on this subject. The plebiscite is taken at the initiation of local officers, or of a certain percentage of the electors, who may at any time sign and present a petition in favor of an election. If the vote be in the affirmative the law remains in force until similar steps are taken for another referendum and the people determine to repeal it, and resume the *status quo ante* with respect to the liquor selling business. If the vote be in the negative licenses, of course, continue to be issued until at some future time a "no license" majority is secured.

By the laws of several States, however, definite periods are prescribed at which the elections may or shall take place. Thus in the cities and towns of Massachusetts and in North Carolina annual elections are contemplated. In Arkansas, Florida, Michigan, Montana, New York, Ohio, Texas and Virginia the referendum may be taken not oftener than once in two years. With a view to reducing the confusion and curtailing the expense of frequent pollings Kentucky and Mississippi have fixed the period at three years, while Georgia and Missouri do not permit an election more frequently than once in four years. In towns in New York four separate propositions are submitted to the people with reference to the sale of liquors. The electors are to decide (1) whether liquors shall be sold to be drunk on the premises; (2) whether liquors shall be sold when they are not to be drunk on the premises; (3) whether liquors shall be sold on a pharmacist's or physician's prescription; (4) whether liquors shall be

[22] Cf. Sandels and Hill's Arkansas *Statutes*, p. 1115; *Revised Statutes* of Florida, p. 329; *Code* of North Carolina, secs. 3113 *et seq.*; Supp. to Sayles' *Civil Statutes* of Texas, art. 3227; *Code of* Virginia, p. 200.

sold by hotel keepers. If the election results affirmatively with respect to any or all of these propositions licenses must accordingly be granted to applicants by the proper officers.[23]

The ballots, it may also be of interest to observe, bear various words and phrases: "For Selling" or "Against Selling" in Florida; "For the Sale" or "Against the Sale" in Georgia and Mississippi; "Prohibition" or "License" in North Carolina; "For License" or "Against License" in Wisconsin; "For Prohibition" or "Against Prohibition" in Texas; "Shall licenses be granted for the sale of intoxicating liquors in this town (or city)?" "Yes" or "No" in Massachusetts. The method of submitting this question, as well as other propositions of the kind is being amended from time to time as changes are made in our ballot systems. The object always is to find a descriptive phrase which, while being concise, will at the same time make it easy for the voter at once to distinguish the propositions and deposit his "ticket" or put his cross on the ballot paper as intelligently and as expeditiously as possible.

In the same way when it is a question of not entirely prohibiting the liquor trade in local districts, but only of regulating it, the referendum, has occasionally found application. In two States, Wisconsin and New Jersey, the people may determine how large a fee shall be collected from innkeepers and the proprietors of tippling shops, and "saloons". "High license" as a method of reducing the evils of intemperance has had many advocates in this country. By a high tax it is hoped to restrict the business within certain definite bounds by materially limiting the number of places of sale. In Wisconsin, for instance, electors of cities, villages and towns may, by popular vote, determine the amount of the license fee, though the election must not be held in the same community oftener than once in three years. In towns when the sum paid hitherto has been $100 the people may vote to increase it to $250 or $400, as they may select. In cities, vil-

[23] New York Laws of 1896, p. 57; *ibid.*, 1897, p. 216.

lages, etc., when the fee has been earlier fixed at $200, the people may choose between increases to $350 or $500. Choice is always to be made from among three different sums, and it is provided "that if the highest amount voted for does not receive a plurality of the votes cast, then the votes cast for such amount shall be considered as having been cast for the next lower amount and shall be so counted".[24]

In cities, boroughs, towns or townships in New Jersey on the receipt of a petition signed by a certain number of citizens asking that not less than a specified sum of money shall be collected of applicants for liquor licenses local officers must arrange for a plebiscite. The people are to vote "For $—— license fee" (the amount named in the petition being inserted in the blank space on the ballot) or "Against $—— license fee".[25]

Very recently socialistic experiments in relation to the liquor trade have been undertaken in several States. These have assumed a form akin to the so-called Gothenburg and other Scandinavian systems. Some of the American schemes of regulation have involved the state still more closely in the business. A state monopoly is created and official dispensaries are established, alcoholic beverages being sold by agents appointed by the government who act in obedience to definite rules. Such a scheme of public management in reference to the whole State has lately been introduced in South Dakota, by an amendment to the Constitution approved by the people at the autumn elections in 1898.[26] In counties, cities and towns in South Carolina in which the sale of liquors has earlier been prohibited by law elections may be held on the question of adopting the dispensary plan as an alternate system.[27] In the neighboring State of North Carolina there

[24] Sanborn and Berryman's *Statutes*, 1898, sec. 1548b.

[25] *General Statutes* of New Jersey, p. 1810.

[26] Session Laws of South Dakota of 1897, p. 88; cf. Constitution of South Carolina, art. viii, sec. 11.

[27] Laws of South Carolina of 1893, p. 434; *ibid.*, 1894, p. 721; *ibid.*, 1896, p. 129.

have been local elections, also, respecting the establishment of dispensaries with a view to putting the liquor trade under municipal control.[28]

Somewhat similar to local option on the prohibition question is the referendum which exists in a considerable number of the Western and Southern States in respect of the building of fences and the restraint of domestic animals. Although this is a matter which touches the finances of private citizens, it certainly is not a form of public expenditure such as the construction of a town hall, a jail, a school house or a road. On the other hand, it is, of course, a financial proposition pure and simple when "fencing districts" are organized and the citizens resident therein tax or bond themselves to build a fence about the whole district in order to protect their lands from stock roaming over unfenced territory, as in Arkansas. This case, however, is exceptional.[29] It is a subject upon which men are certain to entertain very different opinions as in the case of the sale of intoxicating liquors and being essentially a vexed question it is rightly included in this, rather than the preceding chapter.

It is the rule at the "common law" which is the background for all our legal canons on this subject that another's cattle and domestic animals go abroad at their owner's risk, whether there are fences to hinder them or not. It is enough that the animals being at large should damage another person's property. The laws which have been passed by the various State legislatures on this subject are in modification of this well established rule, and the optional "Stock Laws", "Herd Laws" and "Fence Laws" are meant to give the citizens of counties, townships and other local districts the opportunity to decide whether practical conditions in many American communities do not demand a rather different policy. In new communities, as so many have been and still are in the United States, it is expensive for large landowners

[28] Public Laws of North Carolina, 1895, p. 310.

[29] Cf. Sandels and Hill's *Digest* of the Statutes of Arkansas, 1894, p. 443.

to build fences either for the purpose of confining their own animals or for keeping out the herds of their neighbors. All interests then are likely to agree to let live stock run at large, the respective owners employing their own guards and herdsmen at a less cost to themselves than it would be were they to enclose their fields and pastures.

When the two interests, agricultural and pastoral, are brought into close juxtaposition, however, important differences are likely soon to arise among the inhabitants. Civilization moves forward. If an owner has beautiful grounds about his home he desires that they shall not be overrun and damaged by other men's roving stock. He desires that his fields of growing grain, his pastures, so soon as they are cultivated and cease to be mere natural tracts, his gardens and his orchards shall not be feeding places for others' herds and flocks. He wants a guarantee also that his own animals shall not be associated against his will with the males of other owners lest there shall be a mixture of breeds. Thus what was at first in a primitive, pastoral community a tolerable, even a satisfactory condition, becomes with the division and subdivision of land into smaller parcels a matter of serious concern. The richer and more well-to-do farmers are willing to enclose their lands and pen up their stock. They wish their neighbors to do the same thing, a policy however which in the democratic local communities of America is certain to meet with strong resistance. The poor man wants to escape the expense of building a fence. If he does build one it is likely to be a cheap structure and ineffective for its purpose. He is likely too to keep it in poor repair, so that it is no longer "horse high, bull strong and pig tight", a test legally established in rural sections many years ago. He may desire to keep and breed cows, sheep, hogs or poultry when he has no land of his own, merely a small tenement in some industrial village, or a house and "lot" by the roadside. He then turns his animals loose so that they may forage for a living in the roads and streets, in vacant wood lots, forests and other open spaces which are not enclosed within strong fences.

This is the most aggravating phase of the whole development and it creates classes in nearly all rural communities. The richer farmer is arrayed against the "poor man" who wants to keep his cow and his hog and let them run at large in the public streets and commons. Since the politicians in the State legislatures are afraid to incur the displeasure of the "poor men" in their constituencies just as they are afraid of the temperance element, they try to escape their rightful share of responsibility by submitting the whole question to popular vote.

There are general optional laws on this subject to-day in Arkansas,[30] Georgia,[31] Iowa,[32] Kansas,[33] Kentucky,[34] Minnesota,[35] Mississippi,[36] Missouri,[37] New Jersey,[38] North Carolina,[39] Oregon,[40] Rhode Island,[41] Texas,[42] and West Virginia.[43] Besides these there are special laws relating to separate districts which are named in the legislative acts in Alabama, Maryland, Virginia and several other States.[44] The

[30] Sandels and Hill's *Digest* of the Statutes of Arkansas, pp. 443, 1570. Here the optional feature is enforced through a written petition signed by a majority of the qualified electors of the district, instead of by an actual poll of the people by ballot.

[31] *Code* of Georgia, secs. 1777 *et seq.*

[32] *Annotated Code* of Iowa, sec. 444.

[33] *General Statutes* of Kansas, chap. 137, secs. 1 *et seq.*; *ibid.*, chap. 137, secs. 54 *et seq.*; *ibid.*, chap. 138, secs. 6 *et seq.*; *ibid.*, chap. 138, secs. 10 *et seq.*

[34] Barbour and Carroll's Kentucky *Statutes*, secs. 4646 *et seq.*

[35] *Statutes* of Minnesota, sec. 941.

[36] *Code* of Mississippi, secs. 2056 *et seq.*; cf. Session Laws of Mississippi, 1896, p. 145.

[37] *Revised Statutes* of Missouri, pp. 186 *et seq.*

[38] *General Statutes* of New Jersey, pp. 59, 60.

[39] *Code* of North Carolina, 1883, secs. 281 *et seq.*; Public Laws of North Carolina, 1895, p. 54; *ibid.*, p. 537.

[40] *Codes and General Laws* of Oregon, 1892, p. 1501; Session Laws of 1893, p. 89.

[41] *General Laws* of Rhode Island, 1896, p. 420.

[42] Constitution of 1876, art. xvi, sec. 23; Sayles' *Revised Civil Statutes*, 1888, articles 4592 *et seq.*

[43] *Code* of West Virginia, pp. 593, 1034.

[44] Cf. Session Laws of Pa. of 1885, p. 142, and Frost *v.* Cherry, 122 Pa. 417.

tendency as might be expected is toward definitive legislation which will prohibit cattle from running at large absolutely thus marking a return to the common law rule.[45] As population increases and the interests of the people multiply a haphazard system has less and less to commend it, and the demand is for an unalterable and a just rule which shall apply to all parts of the State uniformly. That animals should be allowed to run at large to molest the lands of any person who has not taken the precaution to put strong fences around them is an untenable claim. An immemorial Anglo-Saxon practice and the sense of what is appropriate, orderly and right are wholly on the side of a policy of restraint of live stock so soon as a community passes out from that primitive social condition which has induced men to look temporarily with toleration upon a different legal system.

As with local option respecting the granting of liquor licenses, so in regard to the building of fences various territorial units are selected within which the poll of the people may be taken, according as the county or the town system is of predominating influence in giving form and character to local government within a State. Counties, towns, townships, villages, "militia districts" and "magisterial districts" are all designated as units, and frequently in the same State provision is made for a plebscite in both the larger and the smaller district. Animals of several species come within the purview of these rather curious optional laws. They are made to include not only horses and cattle but also hogs, and sheep and sometimes goats and geese as well. In other cases the term "stock" has a more restricted meaning, being limited to "cattle, horses, mules and asses" as in Iowa. In several States the scope of the proposal to restrain domestic animals is defined in the petition for the election, which must be signed by a certain number of citizens before the plebiscite can be taken. Any one or more species may be desig-

[45] Thus Illinois in 1895 which had earlier had an optional law on this subject repealed it. Starr and Curtis' *Statutes*, 2nd ed., 1896, p. 398; *ibid.*, 1st ed., 1885, p. 279.

nated in the petition and the election is held upon the question of restraining these animals only. In other cases there are two separate stock laws both of which are optional, one relating to horses and neat cattle, the other to hogs, sheep and sometimes goats. Thus in Arkansas, Mississippi and Texas hogs, sheep and goats are specially provided for. Hogs and sheep are in a category to themselves in Missouri, while in Oregon and Kansas a referendum may be separately taken with respect to swine. In communities where other kinds of live stock are still allowed to go at large, there is often little disposition to be lenient with hogs which are a source of great annoyance to careful husbandmen. Geese may also be restrained from running outside their owners' enclosures upon a vote of the people in West Virginia and Rhode Island. As with "License" and "No License" elections in local districts, so too with the stock laws there is fear that the poll may be taken too often. In Georgia, North Carolina and Texas stock and fence law elections may not take place more frequently than once in any one year; in Kentucky not oftener than once in four years.

An odd variation in this form of referendum in the American States is met with in Iowa. Here in counties four separate propositions may be submitted to popular vote: (1) whether stock shall be restrained from running at large absolutely and at all times. (2) Whether stock shall be restrained from running at large between sunset and sunrise? (3) Whether stock shall be restrained from running at large from the first day of (inserting the name of the month) in each year until the first day of (inserting the name of the month) following? (4) Whether stock shall be restrained from running at large between sunset and sunrise from the first day of (name of month) in each year until the first day of (name of month) following?[40] By this means the electors may compel owners to enclose their stock at night time while farmers cannot be on guard, and at certain seasons of the year when the crops are in the ground and when a general

[40] *Annotated Code* of Iowa, sec. 444.

trampling over the open fields would do them serious injury. In Kansas also there is a "Night Herd Law", owners of domestic animals in local districts at the expressed desire of a majority of the citizens being obliged to pen up their stock.[47] West Virginia adds yet another modification to this peculiar local plebiscite with an optional law for the restraint of bulls over one year old, buck sheep over four months old and boars over two months old. Animals of these special classes are to be kept within enclosures by their owners in districts in which the people decide in favor of such a local policy.

Here again the ballots contain various words and phrases: in Georgia, "Fence" or "No Fence"; Kansas, "For the Herd Law" or "Against the Herd Law"; Mississippi, Texas and West Virginia, "For a Stock Law" or "Against a Stock Law"; North Carolina, "Stock Law" or "No Stock Law"; Oregon, "For Running at large—Yes" or "For Running at large—No"; Kentucky, "For the Running at large of Cattle (or the species designated in the petition) in ——— county" or "Against the Running at large of Cattle, etc., in ——— county"; Alabama, "Stock at Large" or "No Stock at Large".

When a "lawful fence" which will form a more effective barrier than a mere boundary line is to be built, it becomes a question of importance to determine of what material it shall be composed. In two cases that have come to my notice this is a subject for a polling of the people. In Texas the electors of any county or subdivision of a county may determine "by a majority vote whether or not three barbed wires without a board or plank shall constitute a lawful fence".[48] In Kansas elections may be held in counties to decide whether a certain "Hedge Law" shall be adopted. If it shall be approved by the people osage orange hedge lines become a "lawful fence".[49]

[47] Cf. Webb's *General Statutes* of Kansas, chap. 137, secs. 1 *et seq.*
[48] *Revised Statutes* of the State of Texas, 1895, p. 999.
[49] *General Statutes* of Kansas, chap. 153, secs. 37 *et seq.*

A singular instance of lack of definite moral or political purpose in a legislature is met with in Maryland. In 1890 the General Assembly of that State enacted a conditional law respecting the taking of oysters with scoops, "scrapes" or dredges in "the waters of Somerset county", *i. e.*, in a portion of Chesapeake Bay. The proposition was to protect these valuable beds from those who would ruthlessly destroy them, and thus preserve the business of catching oysters in this district for the tongmen whose methods are more compatible with the perpetuation of this useful species of shell fish. The boats belonging to dredgers were to be seized, forfeited and sold for the benefit of the school fund and the owners and captains were to be placed under arrest and committed to a public "house of correction". Before going into force, however, the law would needs be approved by the voters of nine election districts in the county, the ballots having printed on them the words, "For prohibiting the taking of oysters with scrapes or dredges" and "Against prohibiting the taking of oysters with scrapes or dredges".[50]

Another peculiar shifting of responsibility regarding a question upon which a legislature might be expected to be able of itself to pass a definitive judgment is to be noted in connection with Sunday observance. Thus the Germans of St. Louis desired the privilege of drinking beer on Sunday. As the introduction of what is often called the "Continental Sunday" was strongly opposed by other elements in the community, the legislature of Missouri in 1857 passed a law enacting that "the corporate authorities of the different cities in the county of St. Louis shall have the power, whenever a

[50] Laws of Maryland, 1890, p. 832. The Supreme Court of Maryland declared this law to be unconstitutional on technical grounds, in that authority was conferred upon the citizens of nine districts of a county to enact a law which affected "the common right of the people of the whole State". *Vide* Bradshaw *v.* Lankford, 73 Md. 428. Nevertheless the legislature re-enacted the law in 1894 in a slightly modified form, retaining that feature of it which required a referendum, this time, however, submitting the measure to a vote of the people of the entire county instead of a few of the smaller component districts. Cf. Laws of Maryland of 1894, p. 908.

majority of the legal voters of the respective cities in said county authorize them so to do, to grant permission for the opening of any establishment or establishments within the corporate limits of said cities for the sale of refreshments of any kind (distilled liquors excepted) on any day in the week".[51] A similar referendum has been proposed several times in late years as a means of arriving at an agreeable result with respect to the moot point of selling liquor on the Christian Sabbath day in New York city, where a very considerable body of sentiment has developed in favor of a less rigorous application of the Sunday laws.

I am impelled to refer in this connection also to recent Canadian experience in the city of Toronto from which can be drawn an instance I have failed to find in the municipal law of the United States. The legislature of the Province of Ontario in 1892 passed an act incorporating "The Toronto Railway Company" and conferring upon it rights and powers to operate street railways in that city. It was specified, however, that no street car should ever be run by the company on Sunday unless the question should first be referred to the people of the city and they should assent to the proposal. It appears that the elements in the city opposed to "Sunday cars" succeeded in limiting the company's business to six days in the week until 1898.[52] Then an agreement was entered into by which the company bound itself not to run its cars beyond a certain definite speed while passing churches during the hours when meetings were in progress, not to ring gongs in proximity to places of worship and not to deprive any of its employees of one full day's rest in every seven. This contract hedged the company about with so many restrictions that the Sabbatarians were outvoted, though they alleged afterward that this result had been attained through the aid of irreligious elements and the Jews. They there-

[51] Laws of Missouri of 1856-57, p. 673.

[52] The question was submitted at three separate elections, on January 4, 1892, August 2, 1893, and May 15, 1897. The proposal was rejected at the first two pollings but accepted at the third, in 1897.

upon began a systematic boycott of the company and it is stated that the residents of Toronto, even when on their way to church, have put themselves to the greatest inconvenience in order to avoid riding on the Sunday street cars. On other days of the week they have patronized the company's lines as before. Many of those who have regarded this Sunday service as a desecration of the Sabbath are eager, it is said, for another election on the subject when they confidently expect that there will be a more Christian result. In no temperance "fight" under a local option law in an American town or village could more unpleasantness and personal feeling be injected into an electoral campaign.[53]

For a long time organizations of Socialists and labor unions have demanded that legislatures should make eight hours a legal day's work. As the first step they have insisted that the government should set the example by paying those whom it itself employs a full day's wage for an eight-hour day. These influences having made themselves a source of political strength in Massachusetts the legislature of the State in 1899 was induced to pass a conditional law on the subject, thus submitting an embarrassing issue to the people of the cities and towns, without compromising itself by showing favor on either side.[54]

[53] Cf. Laws of Ontario for 1892, p. 888; *ibid.*, 1894, p. 450; *ibid.*, 1897, pp. 618 *et seq.* I am informed by Mr. J. J. Cassidey of Toronto that the opposition to the Sunday cars, as might be expected is gradually dying out, while the people of the city are now very generally riding in them. It is unlikely, therefore, that the privilege which the company has won after so long a contest will be withdrawn from it again, since the convenience of the service has come to be appreciated by the citizens.

[54] Acts and Resolves of Mass., 1899, p. 299. The full text of this curious law is as follows: "Be it enacted, etc.—Sec. 1, Eight hours shall constitute a day's work for all laborers, workmen and mechanics now employed or who may hereafter be employed by or on behalf of any city or town in this Commonwealth. Sec. 2, All acts and parts of acts inconsistent herewith are hereby repealed. Sec. 3, This act shall not take effect in any city or town until accepted by a majority of the voters voting thereon at an annual election. Such vote shall be taken by ballot. When so accepted this act shall take effect from the date of such acceptance."

A peculiar referendum has made its way into the municipal law of the State of Massachusetts with the recent development of electric street railways. While there is assumed to be no valid objection to the use of the streets by companies propelling cars by electricity when they carry passengers, and not goods or luggage commonly classed as freight or express matter, their rights respecting the transport of the latter are sometimes extended upon popular vote. Thus the legislature of Massachusetts enacts that "the Northampton Street Railway Company may act as a common carrier of small parcels provided said company shall not so act in the city of Northampton, or in any town until authorized to do so by a two-thirds vote of the voters of said city or town present and voting thereon at an annual or special election held for that purpose".[55]

A company authorized to operate an electric street railway line through the cities of Taunton and Brockton in Massachusetts is placed under the same restriction in respect of a parcels service.[56] In cities and towns of less than 25,000 inhabitants in Louisiana the streets must be kept altogether free from car lines unless the people shall approve of the grants to companies applying for the right of way. Any railroad or other corporation desiring "to use and occupy the streets and alleys" of a town or city or "to obstruct the same or any part thereof with buildings necessary to and used by said corporations" must seek the direct popular sanction.[57] On a favorable vote of the people Boston street railway companies were authorized to replace tracks on Tremont and Boylston streets in that city which had earlier been removed in obedience to an order of the Boston Transit Commission.[58] Occasionally, too, a proposition "to close" a street or alley in a city or town is submitted to popular vote.[59] In the city of Youngstown, O., the question of ma-

[55] Acts of Mass., 1896, p. 394. [56] Acts of Mass., 1896, p. 494.
[57] Laws of Louisiana, 1896, p. 113.
[58] Acts and Resolves of Mass., 1899, p. 390.
[59] Cf. Laws of Maryland of 1890, p. 303.

king a grant to a street car company to run its lines over a new bridge was recently the subject of a referendum.[60] Before this question could be submitted to the people a petition must issue from the owners of more than half of the land fronting on the street through which the cars would run. They must declare that in their opinion the railway would be a benefit to them, or at any rate, would do no harm to their interests in contiguous property.

We meet, too, with a case of still another kind in Kansas where the æsthetic sense of the people in local communities is put in the balance and weighed against a narrow pecuniary interest. In counties the citizens in their wisdom may decide whether the owners of land bordering on public highways shall keep their hedges "cut and trimmed down to not over five feet high except trees not less than sixteen feet apart, and hedges necessary as a protection to orchards, vineyards and feed lots"; also whether these owners shall "cut the weeds" in the public highways lying next their lands "before they go to seed", a measure which is of much practical import to agriculturists, as well as being in the interest of a cleaner and prettier countryside.[61]

The Ohio legislature recently authorized a peculiar local referendum. For some years inventors have been engaged in their experiments with "voting machines", *i. e.,* mechanical contrivances for receiving and recording votes. So universal has the application of machinery now become, and so generally has it substituted man's manual processes in many different fields that there is immediate prospect of an entire revolution also in our voting systems. In a number of States these machines have already been introduced in a provisional way and other States seem to have the change in contemplation. As a method of keeping correct account of the number of votes cast, and of furnishing the returns to the election officers quickly and accurately after the polls close, this mechanical device is held to possess many im-

[60] Laws of Ohio of 1896. p. 620.

[61] Webb's *General Statutes* of Kansas, chap. 153, secs. 47 *et seq.*

portant advantages. In Ohio, however, the State legislature did not desire to endorse the new invention unqualifiedly, nor yet to allow the local boards to do so. It passed a law therefore in 1898 authorizing the officers whose task it is in cities, villages, towns, precincts or other local divisions of the State to supply ballots and other equipment for elections, to submit to the people of these districts, a proposition for the purchase and use of the machines. These officers should take note of the vote and govern themselves accordingly in obedience to the popular will.[62]

There are conditional laws too on the subject of a reform of the civil service in cities which is so essential to the proper administration of the government that only timidity and weakness on the part of a legislature would lead it to submit such a question to popular vote.[63] The legislature of Nebraska desiring to introduce the Swiss systems of the initiative and the referendum into cities and other local districts of the State did not, however, have the full courage of its convictions. It only passed the law contingent upon its later submission to and approval by the people in the various local communities.[64] Recently in Wisconsin a law to regulate the nomination of candidates at party meetings or caucuses, a measure of a type likely soon to become more familiar in this country, devised with the view of "reforming the primaries" and of reclaiming popular government in America from its enemies was referred to the people of certain cities of the State. If this were a reform in our political practice of which we had need the legislature could have had no valid motive in submitting the proposition to any other authority. Only lack of conviction, a desire to evade responsibility, and avoid offense to unworthy elements in the electorate, will explain conditional legislation of this kind.[65]

The discussion of this subject, as it relates to acts of the

[62] Session Laws of Ohio, 1898, p. 277.
[63] Cf. Starr and Curtis' Illinois *Statutes*, p. 826.
[64] *Compiled Statutes* of Nebraska, p. 591.
[65] Sanborn and Berryman's Wisconsin *Statutes*, chap. 5, sec. 111.

State legislature in reference to specific matters submitted to popular vote in local districts, having now been brought to a conclusion it is of a very great deal of interest to record the progress of a movement to introduce the referendum in a general form into the local governmental practice of this country. Just as South Dakota alone is the pioneer with a general referendum on State laws, so Iowa, California and Nebraska, as well as South Dakota, have taken up an advanced position with respect to a general referendum on local by-laws passed by the local legislature. It will be advisable at this point to draw a very clear distinction between two kinds of local laws. Thus far our treatment of the local referendum has related for the most part to laws in regard to local districts which have been passed by the State legislature. In South Dakota, Iowa, California and Nebraska, however, the referendum applies to laws which originate with the local boards and assemblies. While it is held that the legislature may submit laws of concern to local communities to the people thereof and make their going into effect depend upon a favorable vote at the referendum, no local board, or council can make such a submission of a proposition except it receives direct and explicit authorization from one or other of the law-making agents of the State, the constitutional convention or the legislature. In South Dakota, Iowa, California and Nebraska, it must be noted, such a privilege has been conferred upon the local legislative committees and assemblies in general terms, and their power to exercise it is not open to question. In Iowa, for instance, it appears that the "Board of Supervisors" or governing board of any county, may, on its own initiation, or *must,* when petitioned so to do by at least one fourth of the voters of the county, submit to popular vote either at a regular or at a special election "the question whether money may be borrowed to aid in the erection of any public buildings, and the question of *any other local or police regulation* not inconsistent with the laws of the State". The "regulation", or ordinance must be advertised for four

weeks in some newspaper printed in the county, or if there be no newspaper, it may be legally published by posting it up for thirty days "in at least one of the most public places in each township in the county and in addition in at least five among the most public places in the county". Propositions and local measures adopted in this manner may also be rescinded upon the initiation of the people and a subsequent referendum in which a majority of the electors of the county shall vote in favor of such rescission.[66]

Likewise in California on the presentation of a paper or papers bearing the signatures of the legal voters of any county "equal in number to fifty per cent. of the votes cast at the last preceding general election", the Board of Supervisors must submit to the people any ordinance for whose submission the petition makes a request.[67] The new freeholders' charter of San Francisco, recently framed to supersede a charter and the amendments thereto which had been received direct from the State legislature, provides for a poll of the people on city ordinances and charter amendments when an election on these measures is petitioned for by a prescribed number of citizens. All bills to grant franchises to private companies "for the supply of light or water, or for the lease or sale of any public utility, or for the purchase of land of more than $50,000 in value *must* be submitted to the electors" of San Francisco. This referendum is compulsory and no petition is necessary.[68]

The Legislature of Nebraska recently introduced the initiative and the referendum in that State, on by-laws in cities and "other municipal subdivisions" (counties, towns, villages, school districts, etc.) in the Swiss form and by the Swiss name. Any ordinance, order, resolve, agreement, contract or other legislative measure which is proposed by 15 per cent. of the voters of a city or other local district

[66] *Code* of Iowa, secs. 443 *et seq.*

[67] Statutes of California [illegible] 348.

[68] Charter for the City [illegible] County of San Francisco, 1898, art. ii, secs. 20, 21 and 22.

must be submitted to the people thereof at a regular election. If a greater number, or at least 20 per cent. of the electors, sign the petition a special election to decide the question may be held. Respecting ordinances which have been initiated by the local legislatures themselves and have been duly enacted by these bodies, none shall go into force until thirty days after its passage. If within that time a petition signed by 15 per cent. of the voters of the city or other local district, asking for a referendum on the subject, is presented to the duly authorized officers it must be submitted to popular vote at a regular election; again if the number signing the petition equals 20 per cent. of the voters a special election may be called. Urgent measures relating to the "preservation of public peace or health", however, are expressly excepted from these provisions. Furthermore the mayor and city council, without waiting to receive a petition, may at any time at their own instance call an election in regard to any question upon which they desire advice from the citizens at large. The entire law is itself conditioned upon its direct acceptance by the people in the various cities, counties, towns, etc., of Nebraska. The referendum thus curiously is itself the subject of a referendum.[69]

The recent amendment to the Constitution of South Dakota which introduces the Swiss initiative and referendum in respect of State laws, to which allusion has been made in an earlier chapter, is also of application to municipalities. It contemplates that five per cent. of the voters in any local district may originate and have submitted to popular vote any local ordinance which may suggest itself to them, and also that five per cent. of the electors may demand a referendum on any law which has already been passed by the local governing board or council.[70]

It is to be noted in summarizing this particular section of our subject that the referendum on local questions in the counties of Iowa and California is purely an American de-

[69] *Compiled Laws* of Nebraska, pp. 588 *et seq.*

[70] Session Laws of South Dakota, 1897, pp. 88-89.

velopment in line with our own tendencies and traditions. In San Francisco, Nebraska and South Dakota, on the other hand, it is clearly an importation, an adaptation of the Swiss system for which American politicians of a certain type have lately expressed so much interest and admiration. Their agitations are now beginning to bear fruit in many parts of the " Great West ".

CHAPTER XIII

THE LOCAL REFERENDUM—IS IT CONSTITUTIONAL?

HAVING traced the historical development of law-making by popular vote as it bears directly upon local government in the United States we come at once to the consideration of another question—the regularity and validity of the system, especially from the view-point of the courts. We have to inquire if the referendum on local laws in local communities is constitutional. It has been noted already in another place that the weight of judicial opinion is quite strongly against the submission of laws to popular vote, when they are general State laws of application to the entire State. On a plain issue of this kind the courts, so far as they have gone in the matter, are disposed to discourage conditional legislation of such a character, on the ground that it is a delegation of power to a foreign body which is not known to the constitution. When the constitution of a State specifically declares that the law-making power shall repose in a representative legislature under definite conditions and regulations, it is assuredly not competent for the legislature to decline to perform the task to which it has been assigned and pass it on to some other agent. Nevertheless various methods of evading the rule have gradually come into vogue in the course of the development of local government in the United States, and although there can be little disagreement as to the unconstitutionality of the submission to popular vote of a general State law, such as the New York Free School Law of 1849,[1] there are roundabout means to an end.

A discussion of the question of the constitutionality of the

[1] Cf. Barto *v.* Himrod, 4 Seld. 483.

referendum excepts those cases, of course, in which the representative legislatures divide the legislative power with the citizens at large by authority derived from the State constitution. Although the referendum may still be out of harmony with our unwritten English law which places the legislative power of the State in the hands of representatives, on the theory that a few of the wisest and most capable can legislate more intelligently than the whole unorganized electorate, it is at any rate "constitutional" in the American sense, if the written constitutions expressly confer such a right upon the people.

We are to discuss the case, however, of laws which are passed by the State legislature subject to later ratification by popular vote, when no authorization for such a submission is contained in the constitution, and when the measures apply to local subdivisions of the State. The question is then as to the constitutionality of "local option" laws, an expressive designation for legislation of this kind, in popular parlance, though without reason, restricted to prohibitory liquor laws which are referred to the electors in counties, towns and other local districts. It need scarcely be said that the term may have a very much wider use and it is convenient to extend its meaning and scope in this place. There are various kinds of local option laws, and I refer here not to the subject of the law, but to the form in which it is submitted to popular vote. There is the case (1) of special laws passed by the legislature with respect to some locality particularly designated. These laws are very numerous in the few States in which special legislation is still permitted. Thus an act adopted by the legislature of Maryland, providing for the issue of bonds in a certain town for the purpose of enabling the municipal authorities to subscribe to the capital stock of a railway company, prescribes that it shall be referred to the people and "if a majority of the votes" given in at the election on the question shall be "in favor of this act then the same shall forthwith go into effect".[2] A law recently enacted by the

[2] Laws of Maryland, 1894, p. 884.

legislature of Massachusetts provides that "so much of this act as authorizes the submission of the question of its acceptance to the legal voters of said city shall take effect upon its passage but it shall not take further effect unless accepted by the legal voters of said city as herein prescribed".[3] Of course a very large number of cases of this kind might be cited. The legislature thus clearly submits a local law to another agent not clothed by the constitution with law-making power, *i. e.*, the people in a body. The legislature enacts no law; it merely submits a project of a law, unless, if you choose, it definitively enacts that portion of the measure which prescribes a method by which the referendum shall be taken, a distinction not very important or valuable.

(2.) We have the general local option laws which apply to all the counties, townships or other local districts of the State (with perhaps a few designated exceptions). These laws exist in almost endless variety and relate to the location of county seats, the sale of liquors, the restraint of live stock, the issue of bonds for many purposes, the levy of taxes, the choice of methods of administration in reference to the poor and with regard to the roads, and other questions of local management. These too are not laws when they leave the legislature's hands. They are mere projects of laws. They, however, relate to a large number of possible districts, any one or more of which may bring the measure into force within the bounds of that particular locality. If it is not adopted, however, even by one single district, the act still retains its place on the statute books of the State until it is repealed or amended by the same power which placed it there, namely the legislature. It operates, in a sense, automatically in that any eligible locality on its own initiation, through popular petition or through its representative officers, may make a request for a poll of the people on the subject. If the necessary majority is secured the law comes into force within that one local district and remains in force until it is repealed, by local procedure when that is permitted, or

[3] Acts of Massachusetts, 1896, p. 312.

by the State legislature. For example a law of this kind in South Dakota passed in 1891 provides: "If a majority of the electors at any election shall have voted in favor of the proposition then all the provisions of this act shall apply to and be in force in such county [the county in which the vote is taken]. But if a majority of such electors shall have voted against such proposition then the provisions of this act shall not apply to such county".[4] A recent law in Missouri says: "This act shall be in force and take effect only in such counties as shall adopt the same by a majority of the qualified voters who shall vote for or against its adoption".[5]

In order to avoid unfavorable judicial opinions various subterfuges are sometimes employed with the result of changing the issue verbally, if not actually and in fact. Thus it is sometimes specified that the act shall "take effect immediately", but that its provisions "shall remain inoperative" until the law is assented to by a majority of the legal electors of those districts to which it is meant to apply.[6] Again the proposition sometimes is not to ratify a law, but to abolish certain provisions of the State code, or to repeal a law already definitively enacted by the legislature.[7] In Missouri I have found a law which prescribes that "the provisions of this article are hereby suspended in the several counties in this State until a majority of the legal voters of any county voting at any general or special election called for that purpose shall decide to enforce the same in such county". Here, curiously enough, the poll of the people is taken, not to enact the law, but to decide whether it shall be enforced.[8]

(3.) There is local option also according to what may be denominated the "New Jersey plan", because of the extended use of this kind of conditional legislation in that State. This is essentially a dishonest form of law-making inasmuch

[4] Laws of South Dakota, 1891, p. 27.
[5] Session Laws of 1893, p. 227.
[6] Cf. New Jersey Laws of 1897, p. 449.
[7] Cf. *Revised Codes* of North Dakota, sec. 1550, and Pennsylvania Laws of 1885, p. 142.
[8] *Revised Statutes* of Missouri, 1889, p. 186.

as it professes to be general in its application to the localities, while it in reality is wholly special, creating great confusion and conflict in a field in which uniformity is much to be desired. A law framed to meet a need in some particular instance which has been brought to the attention of certain members of the State legislature is passed in reference to cities, boroughs or other local districts. This law is "accepted" or "rejected" by the electors in a referendum. At some recent sessions of the New Jersey State legislature such conditional acts have been passed in great numbers. Being without general applicability either in subject matter or intent such legislation can only be looked upon as vicious both in principle and practice. It injects great uncertainty into municipal government which above all things should be stable, pursuing a definite administrative course. It opens the way to constant change in charters and local government acts which, even if they are first submitted to the people of the districts to be affected by them, should the latter desire to avail themselves of the opportunity to adopt the provisions of such a law, is not the less a source of needless disorganization. Conditional acts of this kind have been passed in rapid succession by the legislature of New Jersey in reference to the water supply of cities, the drainage systems, roads, streets, parks, the salaries of civil officials, taxation, indebtedness, the purchase of land, etc.,—all subject to a vote of acceptance by the people of separate localities. Even the most superficial and hasty consideration of these measures will serve to indicate their special character and confirm us in our view of the nature of this kind of legislation.[9] And New Jersey is not alone among the American States in submitting laws of this class to popular vote.

(4.) The "alternate law" is a type which is made familiar

[9] Cf. *General Statutes* of New Jersey, 1896, pp. 495, 500, 508, 535, 539, 575, 617, 640, 646, 729, 739, 774, 785, 1504, 1506, 1519, 1524, 1536, 1537, 1543, 1545, 1548, 1551, 1557, 1558, 2209, 2211, 2618, 2951, 3085. Session Laws of New Jersey of 1896, p. 43; *ibid.*, 1897, p. 449.

in the legal system of several States. By this method laws are submitted in alternate forms. The legislature in this case is perhaps more than a proposer of the law. It has already taken definitive action in that it prescribes rules and regulations to govern the subject at ordinary times, offering, however, an alternate law to the qualified voters of the localities which they may adopt if they like. Upon a favorable vote in any district this alternate law comes into force instead of the definitive law earlier enacted by the legislature. Such a system prevails in West Virginia for instance as regards the management of the public roads.[10] In one sense nearly all local option laws are alternate laws. The plebiscite on the subject of the prohibition of the sale of alcoholic liquors for instance has this form, since if the proposal to close the dram shops be defeated the license law remains in force. There is some law on the subject in nearly every mentionable case. Even though the people should accept none of the new legislation proposed to them there would not be a complete lack of legal system. From this point of view, therefore, in reality if not in name, all local option laws are "alternate laws".

It may be said of course of all these distinctions that they relate entirely to unimportant details of form. I said this at the outset, and although other modifications in the textual form of conditional laws in this country could be introduced into this classification I incline to the belief that this is a sufficiently accurate division of the subject to illustrate the general character of such legislation as it refers to local communities in the United States. Whether the laws submitted to the people are special or general, relate to one district or possibly fifty or sixty, are submitted as definite single propositions or as whole acts, whether they are "alternate laws" or laws which the people may directly enact or indirectly enact by repealing some existent provisions of a code which has earlier been passed by a representative legislature, the result is always the same from the point of view

[10] Cf. *Code* of West Virginia, 3rd ed., 1891, pp. 332, 338, 344.

of political science. There are legal differences for the jurist and fine quibbles for the practical lawyer, but technicalities aside, it is in all these cases quite as if it were stated explicitly in connection with each separate law: "This act shall not take effect until it shall have first been ratified by the qualified voters of ..... county (city, village, township, etc.)."

The question now to be determined is whether or not legislation of this kind referred to the people of the various governmental subdivisions of a State by the legislature of the State is constitutional. When the written State constitution specifically provides that such a subject as the location of a county seat, the changing of a county boundary line, the annexation of one municipality by another, the restraint of live stock, the prohibition of the sale of alcoholic beverages and so forth, shall be submitted to the qualified electors no one for a moment doubts the legality of this process. When, however, there is no such specific provision in the constitution, a very important legal question arises, and it requires careful historical consideration before we shall be able to come to a fair judgment of the case.

Of the large number of judicial decisions from the highest State courts on the subject of law-making by popular vote, much the greater part relate to laws in reference to local districts submitted to a vote of the people of those local districts, being therefore directly in point at the present stage of our discussion. Measures in reference to the whole State, submitted to the people of the whole State, have been passed upon by the courts scarcely a half dozen times in the entire history of this government and the subject in this one of its aspects has been discussed already in its proper connection on an earlier page. Very few opinions were delivered prior to 1850, since legislation of this kind before that time was not common in this country. What did exist was not of a character to arouse animosity and lead to a test of strength between contending social forces until conditional laws came to be passed, levying higher taxes on the people in order to

carry out public improvement, and prohibiting the liquor traffic, thus depriving some men of their means of obtaining a livelihood and interfering with other men's forms of indulgence and established manners of life. Local option laws respecting taxation and the prohibition of liquor selling are to be credited with having called forth the vast majority of American judicial opinions on the referendum.

Before 1850 I note eight opinions from the highest courts of eight different States in which the question of the validity of the local referendum is more or less fully considered and reviewed. Of these eight, three relate to the prohibition of the liquor trade, three to taxation or the public subscription of stock to private companies, and two to other questions of local government. In six of the eight cases the validity of this method of submitting local laws to popular vote was affirmed and in two, both cases arising out of local option liquor laws, it was denied. The first of the eight opinions was delivered by the Supreme Court of Massachusetts in 1826 (Wales *v.* Belcher, 3 Pick., 508). A law passed by the Massachusetts State legislature had referred the question of the jurisdiction of certain courts in Boston to a vote of the people of the city. A point having been raised in regard to the constitutionality of such legislation the Supreme Court said: "This objection [to the law] for aught we see stands unsupported by any authority or sound judgment. Why may not the legislature make the existence of an act depend upon the happening of any future event? Constitutions themselves are so made; the representative body in convention or other form of assembly fabricates the provisions, but they are nugatory unless at some future time they are accepted by the people. Statutes incorporating companies are made to derive their force from the previous or subsequent assent of the bodies incorporated. A tribunal peculiar to some section of the commonwealth may be thought by the legislature to be required for the public good and yet may not be acceptable to the community over which it is established. We see no

impropriety, certainly no unconstitutionality, in giving the people the opportunity to accept or reject its provisions."

In an opinion from the Court of Appeals of Virginia in 1837 (Goddin *v.* Crump, 8 Leigh, 120), in a case arising from a law which gave to the people of the city of Richmond the right to assent to or reject a proposition for the public subscription of stock to a canal company the same principle was affirmed. In Maryland in 1844 (Burgess *v.* Pue, 2 Gill., 11), the highest court of the State delivered an opinion favorable to a local option law which levied a tax for school purposes. In Illinois in 1848 (People *ex rel. v.* Reynolds, 5 Gilm., 1), a case growing out of a law to divide a county, and in Kentucky in 1849 (Talbot *v.* Dent, 9 B. Mon., 526), in an opinion induced by another act authorizing a municipality to subscribe to the stock of a private company the courts again sustained the legitimacy of this kind of legislation.

In June, 1847, in Delaware, however, the Court of Errors and Appeals took up a new position and in unqualified terms pronounced against the constitutionality of a local option liquor law which had been passed by the legislature of the State in the preceding February (Rice *v.* Foster, 4 Harr., 479). The entire subject was thoroughly reviewed in its fundamentals. Direct legislation by the people was contrasted with the representative system of government. The legislative power of the State being vested in the General Assembly by the constitution, the judges declared that the people could not "resume or exercise any portion of it". "To do so", the court continued, "would be an infraction of the constitution and a dissolution of the government". Moreover if the problem were considered on its federal side the Constitution of the United States provided that Congress should guarantee to each State "a republican form of government". This provision prohibited any State from establishing a "democracy", which would be a natural result were laws submitted to popular vote, a policy which would "de-

molish the whole frame and texture of our representative form of government and prostrate everything to the worst species of tyranny and despotism, the ever-varying will of an irresponsible multitude". The Delaware judges did not perceive, or at rate failed to recognize in their opinion, any distinction between laws of a general character relating to the whole State and submitted to the people of the whole State, and local option laws. They in fact denied the whole contention, declaring that if the legislature could refer one subject to a vote of the people it could just as well so refer all subjects. There was in the court's view no middle ground which might be occupied harmoniously with the established system of government in the American States.

A very few months later, in November, 1847, the highest court in Pennsylvania passed judgment on a local option liquor law similar to that which had drawn forth the notable decision in Delaware. This court also denied the whole proposition generally and without qualification or reserve (Parker *v.* Commonwealth, 6 Barr., 507). The opinion put the court so far out of line with later developments respecting this subject indeed, that they were led to declare, that, for the legislature to surrender the law-making power to the citizens at large in the local communities, was even less permissible than for it to resign its functions in favor of the people of the whole State. "It is a duty [*i. e.*, the duty of making laws] which cannot be transferred by the representative", the judges said, "no not even to the people themselves, for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the General Assembly; much less can it be relinquished to a portion of the people who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community".

A local option liquor law of precisely the same character led to an important opinion by the Supreme Court of Vermont in 1849 (Bancroft *v.* Dumas, 21 Vt., 456). The court here took a quite opposite view of the question and, as re-

gards the general proposition, declared that it was "in accordance with the theory of our government that all our laws should be made in conformity to the wishes of the people". It could "surely then be no objection to a law that it is approved by the people". Passing to a more specific treatment of the subject the court continued: "We believe that it has never been doubted that it is competent for the legislature to constitute some tribunal or body of men to designate proper persons for innkeepers and retailers of ardent spirits" and "if the legislature could legally and constitutionally submit the question of whether licenses should be granted to the determination of a portion of the people [*i. e.*, to the members of some local board or tribunal], could they not with equal if not greater propriety submit it to the decision of the whole people"? Continuing the court explained that "laws are often passed and, by the terms of the statute, made to take effect upon the happening of some event which is expected to occur", but they were "not aware that such laws for that reason had been regarded as invalid".

From 1850 onward stripping the various decisions respecting laws of this kind of needless verbiage and technicality, which have been called forth in specific instances for one reason or another not germane to the discussion, some conclusions may be arrived at of a rather absolute character as regards the trend of judicial opinion on the subject of the referendum in the United States. In nearly all the States in the Union the courts have considered and discussed this question, and the tendency has been distinctly favorable to this kind of legislation. Since 1850 we find opinions in only four States which are adverse to law-making by popular vote in local districts. These are California, Indiana, Iowa and Texas, Iowa being the most notable for the number of decisions in which the court have consistently followed their own precedents. The leading cases in which unfavorable opinions have been delivered in the four States named are *Ex-parte* Wall[11] in California; Maize *v.* The State[12] and

[11] 48 Cal. 279. [12] 4 Ind. 342.

Greencastle Township, etc. *v.* Black[13] in Indiana; Geebrick *v.* State,[14] State *v.* Weir[15] and Weir *v.* Cram[16] in Iowa; State *v.* Swisher[17] in Texas. As Rice *v.* Foster and Parker *v.* Commonwealth, in Delaware and Pennsylvania respectively, date from a period anterior to 1850, so all the later cases except one California, one Missouri and two Iowa cases are earlier than 1860. The most recent of the opinions, and also one of the most vigorous in the series, is that in the case of *Ex-parte* Wall in California in 1874. As the opinion in Parker *v.* Commonwealth in Pennsylvania was soon modified, and in 1874 in Locke's Appeal[18] directly reversed, so there has been a like tendency at work in other States. The line of argument which the court had laid down in Indiana in Maize *v.* The State, etc., was gradually departed from until in Groesch *v.* The State,[19] quite new ground was found. State *v.* Swisher in Texas was directly overruled in 1883 by the Court of Appeals,[20] and in California both prior to and since the opinion in the case of *Ex-parte* Wall there have been decisions in favor of the referendum in municipalities and other local districts. In Iowa where a view hostile to the constitutionality of such laws has been most persistently held, it having been reasserted by the court on many different occasions, there have been not infrequent departures from the general principle. The court on account of their vacillating policy with respect to this subject have been led into many conflicting opinions. Geebrick *v.* State and the later cases would seem finally to have been reversed in 1895 in State *ex rel.* Witter *v.* Forkner, 94 Iowa, 1, when there was a thorough judicial review of a prohibitory liquor law which was known as the "Mulct Law", a kind of legislative subterfuge for "local option", as regards the sale and manufacture of alcoholic beverages. Unless another tendency should later set in, there is then every reason for the belief that,

[13] 5 Ind. 557. [14] 5 Iowa, 491.
[15] 33 Iowa, 134. [16] 37 Iowa, 649.
[17] 17 Texas, 441. [18] 72 Penn. 491.
[19] 42 Ind. 547. [20] 14 Tex. Court of Appeals, 505.

supported by the weight of authority of more than a half century, the referendum regarding local matters in American communities is now a valid and constitutional part of our system of government in every one of the forty-five States.

It is to be noted, furthermore, of these various adverse opinions that nearly all were called forth by local option liquor laws, as in Rice *v.* Foster, Parker *v.* Commonwealth, State *v.* Swisher, Geebrick *v.* State, State *v.* Weir, and Maize *v.* The State. If these opinions were disregarded the American State courts would be in virtual unanimity respecting this question. The student who has read after the judges that occupy the benches in our highest State courts must conclude that they are not without personal bias in a consideration of this subject. They are wont to regard this as an occasion when their own views respecting the liquor-selling question, which has aroused so much bitter feeling in American communities, should be consulted, and the law in the case is therefore accorded a secondary place. There is no escape from the thought that such opinions as *Ex-parte* Wall were directly induced by the personal interest of the judges who if they had been asked to pass upon a local option stock law, for instance, would have found no ground for their vigorous defence of constitutional forms. When these additional facts are properly considered the evidence from the records of the courts seems the less entitled to bear heavily against the system of law-making by popular vote in local districts in this country.[21]

But it is of interest to inquire a little farther as to the grounds taken by the courts in these various opinions. The adverse decisions are, of course, based on the general principle enunciated in Rice *v.* Foster, which certainly holds in respect of laws not of a local character that might be submitted to the people of the entire State. The courts in these cases have failed to recognize any distinction between legislation for the State and legislation for local districts of the State, and have declared in more or less definite terms that the

[21] Cf. Oberholtzer, *op. cit.*, pp. 103, *et seq.*

legislature, being constituted a body whose specific function it is to propose, discuss, deliberate upon and pass laws to apply to the districts under its jurisdiction, cannot resign its place in favor of any other tribunal whatsoever, not even the people themselves. Up to this point all authorities are in agreement, but important modifications are subsequently introduced into the argument in nearly all the States, as we have just noted, so that the local referendum has gained a secure foothold throughout the Republic. These exceptions to the general rule are taken mainly on the following grounds, viz:

(1.) That laws may be passed whose going into effect is made to depend upon a contingency such as the happening of a future event, or the fulfillment of a prescribed condition. This contingency then it is argued, may as well be a favorable vote of the people as anything else.

(2.) That laws in reference to a municipality or local district may be enacted by the legislature at will, except as limits are established in the State constitution—and by reason of the legislature's extensive powers in this direction, which it is not able to exercise without the co-operation of some mediate authority, it may call to its aid the citizens at large. It is customary to delegate powers with respect to local government to designated agents such as the commissioners of counties, the trustees of towns, the mayors and councils of cities, the judges of local courts and the officers of townships. If such authority can be conferred upon agents of this kind why may not others be appointed, as for instance, the whole body of voters?

Respecting the first line of argument which leads us to a deviation from the rule, the theory that a contingency may exist, that there may be a condition precedent to the law's taking effect which if it is not met will prevent it from taking effect, there are many opinions tending to support the view. The Federal practice has been pointed to as furnishing examples of legislation passed in a conditional way, its going

into force being dependent upon the happening of some future event. One of the first cases of this kind on record, Wales *v.* Belcher, *supra,* which was decided in Massachusetts in 1826, drew forth an opinion from the Supreme Court of that State of much interest in this connection. The court said that a law might recognize the existence of a contingency and that this contingency might be the acceptance by the people of the provisions of the act. The judges asked, "Why may not the legislature make the existence of any act depend upon the happening of any future event?" and added: "Constitutions themselves are so made; the representative body in convention or other form of assembly fabricates the provisions, but they are nugatory unless at some future time they are accepted by the people. Statutes incorporating companies are made to derive their force from the previous or subsequent assent of the bodies incorporated", etc.

"Statutes incorporating companies", it is well to remember, are by no means the only laws which depend upon the occurrence of a future event. One of the most common forms is a statute which is to go into effect on some future day. The contingency in this case, though the similitude be a little strained, is the arrival of a certain date. Such a case has been very frequently cited by the State courts in the development of this principle, since it was announced in 1826 in Massachusetts and applied in defence of the referendum in the American States. There are many laws furthermore, and their constitutionality is not called into question on this account, which contemplate that certain acts shall be performed by local magistrates and administrative boards. If these conditions are met and fulfilled the act goes into effect; if not it remains in whole or in part a dead letter. Thus to cite only one concrete instance, among many which might be named, it was provided in a law recently adopted by the legislature of North Dakota, that "the last five sections shall take effect and be in force in each county in this State only

upon a resolution to that effect being adopted by the board of county commissioners thereof ".[22] A law in reference to the capture of sturgeon in the Delaware River, approved by the legislature of New Jersey in 1895, provided in its final section " that this act shall take effect when similar acts shall have been passed by the legislatures of the States of Delaware and Pennsylvania ".[23] Many similar cases might be mentioned and this method of enacting laws is indeed so usual that it has furnished a basis of great strength for the judicial view that the contingency may as well be the assent of the people to the law as any other event or circumstance.

A statement of this line of argument which is perhaps as clear and direct as any to be found in the Reports of any of the State supreme courts comes from the Virginia Court of Appeals. The opinion was delivered so long ago as in 1855 (Bull *v.* Read, 13 Gratt., 78). The case grew out of an act establishing a system of free schools, if the inhabitants of a particular district of a county should vote to accept the provisions of the law. The court in their review of the subject on this occasion said: " It will be conceded that the legislature may provide that an act shall not take effect until some future day named, or until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specified condition. The exigencies of the government may frequently require laws of this character, and to deny to the legislature the right so to frame them would be unduly to qualify and impair the powers plainly and necessarily conferred. Accordingly we find this a familiar feature in the legislation both of the national and State governments. . . . The Non-Intercourse acts of March 1, 1809, May 1, 1810, and May 2, 1811, were expressly made to depend upon the course that might be adopted by England and France with regard to the edicts promulgated by them, to be made known by proclamation of the president. And the principle

[22] *Revised Codes* of the State of North Dakota, 1895, sec. 1732.
[23] *General Statutes* of New Jersey, pp. 1593-94.

of this mode of legislation was sustained by the Supreme Court, Brig Aurora *v.* United States, 7 Cranch, 382. Nothing is more common than for an act of assembly to be made to commence upon a future day. The code of 1849 is an instance of the kind. All acts of incorporation are, in effect, acts to take effect upon a future event, the acceptance of the corporators; for without their consent the corporate body cannot be created. The various acts making subscriptions on the part of the State to works of internal improvement when a certain amount shall be raised by private subscriptions are of this character. The several acts authorizing the Baltimore and Ohio Railroad Company to construct their road through the territory of Virginia contain the same feature. Such was the character of the act of March 3, 1835, which authorized the county courts to dispense with the first and second sections of the act in their respective counties and reinstate the road law of 1819. Such also was the act of February 3, 1846, accepting the county of Alexandria upon its retrocession. Instances of the same kind might be multiplied indefinitely. Now if the legislature may make the operation of its act depend on some contingency thereafter to happen, or may prescribe conditions, it must be for them to judge in what contingency or upon what condition the act shall take effect. They must have the power to prescribe any they may think proper; and if the condition be that a vote of approval shall first be given by the people affected by the proposed measure it is difficult to see why it may not be as good and valid as any other condition whatever. There can be no inherent vice in the nature of such a condition which shall serve to defeat the act when it would be legal and effectual if made to depend upon some other event."

The subject was so thoroughly reviewed by the courts years ago that in recent opinions the fact that a contingency may exist, and that a favorable vote of the people of a locality may constitute that contingency, is in the nature of a well established maxim. Thus in 1895 in Mississippi, Lum *v.*

Vicksburg, 72 Miss., 950, the court distinctly declared "that a law may become operative upon the happening of a future event, although that contingency may be the result of an election by the people, and that this is too well settled generally, and in this State particularly, to be now again considered by us".

In Michigan, to mention but one more recent instance, the Supreme Court in 1890, Feek *v.* Township Board, 82 Mich., 393, said: "The legislature in conferring upon the board the authority to pass such order [*i. e.*, an order prohibiting the liquor business] had the right to prescribe the conditions under which it might be exercised; and this condition is that the majority of the legal voters vote in favor of the proposition. . . Numerous authorities might be cited to show that it is legal and competent for the legislature to provide that a law shall go into effect upon the happening of a contingency, some of which are cited in the brief of the Attorney-General. The proposition is too clear to need the citation of authorities." [24]

As regards the second line of argument which rests upon the admittedly large powers possessed by the State legis-

[24] Some of the leading cases in the different States in which this theory has been developed in addition to those which may have been already named are the following: Fell *v.* State, 42 Md. 71; Trammel *v.* Bradley, 37 Ark. 374; Blanding *v.* Burr, 13 Cal. 343; *Ex parte* Wall, 48 Cal. 279; Mayor and Council of the City of Brunswick *v.* Finney, 54 Ga. 317; Groesch *v.* The State, 42 Ind. 547; Santo *v.* State, 2 Iowa, 165; Geebrick *v.* State, 5 Iowa, 491; Taylor *v.* McFadden, 84 Iowa, 262; Noffzigger *v.* McAllister, 12 Kan. 250; State *ex rel. v.* Hunter, 38 Kan. 578; Slack *v.* Maysville and Lexington Railroad Co., 13 B. Mon. 1; Commonwealth *v.* Weller, 14 Bush. 218; Roos *v.* State, 6 Minn. 291; Alcorn *v.* Hamer, 38 Miss. 652; Schulherr *v.* Bordeaux, 64 Miss. 59; Lammert *v.* Lidwell, 62 Mo. 188; State *ex rel.* Maggard *v.* Pond, 93 Mo. 606; State *v.* Noyes, 10 Foster, 279; C. W. & Z. R. R. Co. *v.* Clinton County, 1 O. S. 77; Gordon *v.* The State, 46 O. S. 607; Moers *v.* City of Reading, 21 Penn. 188; Locke's Appeal, 72 Penn. 491; Johnson *v.* Martin, 75 Tex. 33; 14 Texas Court of Appeals, 505; State *v.* O'Neill, 24 Wis. 149; Smith *v.* City of Janesville, 26 Wis. 291; Dowling *v.* The Lancashire Insurance Company, 92 Wis. 63; *In re* Village of North Milwaukee, 93 Wis. 616; Trustees of Paris Township *v.* Cherry *et al.*, 8 O. S. 564; Peck *v.* Weddell, 17 O. S. 271; State *ex rel.* Wilcox, 45 Mo. 458; Manly *v.* City of Raleigh, 4 Jones Eq. 370.

latures with reference to municipal and *quasi*-municipal corporations the reasoning is very direct. The legislature, being unable to exercise its authority without the co-operation of local agents which are designated to attend to affairs of local administration, it is an easy step to change the agents. If these powers are already entrusted to selectmen, trustees, commissioners, supervisors, mayors and members of councils and other representative officers and local boards it is not far to go to the whole body of electors. In New England the voters assembled in town meeting are permitted by the legislature to make determinations in regard to many matters pertaining to local government, elsewhere usually left to the discretion of a few representatve officers. The referendum provides a method, where the town meeting does not exist, of collecting the sentiments of the people and of introducing them *en masse* as a tribunal in local government. This argument deduced from the legislature's extensive rights over municipalities is based also upon grounds of expediency, since the submission of such laws to local officers and bodies is held greatly to conduce to the proper administration of local affairs which, in the nature of the case, are often so special in character as to make suitable action on the part of a law-giver stationed at some distant post not very feasible. A judge or a local board is authorized to determine whether licenses for the sale of liquor shall be granted. Why then, it is asked, may not all the electors in the district to be affected by the order decide this question? An officer or several officers are authorized to decide whether a certain tax shall be laid, whether a county boundary line shall be changed or a county seat removed, whether one town shall be annexed to another for purposes of government. Why may not such questions be referred to some other authority, namely, to the voters themselves?

To how large an extent considerations of expediency, rather than those of law, have had to do with this development in the United States, will appear from the following opinions in which this theory as to the power of the legis-

lature over municipalities as an explanation and defence of the referendum, seems to have been fairly stated. As early as in 1844 the highest court in Maryland in Burgess *v.* Pue, 2 Gill, 19, a case arising out of a law to tax the people in aid of free schools said: "We think there was no validity in the constitutional question which was raised by the appellee's counsel in the course of his argument, relative to the competency of the legislature to delegate the power of taxation to the taxable inhabitants for the purpose of raising a fund for the diffusion of knowledge and the support of primary schools. The object was a laudable one, and there is nothing in the constitution prohibitory of the delegation of the power of taxation in the mode adopted to effect the attainment of it; we may say that grants of similar powers to other bodies for political purposes have been coeval with the constitution itself, and that no serious doubts have ever been entertained of their validity. It is therefore too late at this day to raise such an objection."

The Supreme Court of Louisiana in 1853, Police Jury *v.* McDonogh, 8 La. An., 341, in an opinion induced by an act authorizing local districts upon a vote of the people to subscribe to the stock of internal improvement companies, said: "The right of the legislature to delegate the power of taxation for local purposes to municipal authorities is established in this State, and in our sister States, by an uninterrupted train of legislative precedents and judicial decisions. The necessity and propriety of such delegation are obvious. The supreme jurisdiction has not leisure nor information to take cognizance of and manage all the matters which concern a particular locality. The interests of a particular town or county are best understood and can be best administered by its inhabitants, or persons of their choice selected under legislative authority. Our own statute books and those of our sister States are filled with acts creating these political corporations whose powers are emanations from the legislative will and subject to be enlarged or curtailed by that will from time to time, as the wisdom of the legislature may dictate.

. . . If the legislature could constitutionally confer on the police jury authority to pass a taxing ordinance, it would seem rather a safeguard against oppression than the reverse to qualify the power of requiring it to be exercised with the approbation of a majority of those who are to bear the burden. Certainly one would be inclined, with much show of reason, to suppose that a system sanctioned by the legislative will and tested by a long experience in one of the oldest States in this Union—a State which was amongst the foremost in the struggle for constitutional liberty—could not well be inconsistent with the principles of representative government. If we look to Massachusetts how do we find municipal matters managed there? If any change is to be introduced into the existing state of things, or if they wish to undertake any new enterprise, the selectmen are obliged to refer to the source of their power. If, for instance, a school is to be established the selectmen convoke the whole body of the electors on a certain day at an appointed place; they explain the urgency of the case; they give their opinion on the means of satisfying it, on the probable expense, and the site which seems most favorable. The meeting is consulted on these several points; it adopts the principle, marks out the site, votes the rate and confides the execution of the resolution to the selectmen. The system practiced in Massachusetts is not unknown in other States. . . . It seems to us a matter of surprise that the caution of the legislature in its grant of the taxing power should be made a subject of reproach."

The Court of Appeals of Kentucky in 1874, Anderson *v.* Commonwealth, 13 Bush., 485, in a case in which the special subject brought forward for review was a local option liquor law, said: "We agree that the question of license or no license is one properly of local police and may be constitutionally left to the decision and discretion of the lawfully created agencies representing and acting for the local public to be immediately affected by the retail liquor traffic, such as the county courts and the municipal authorities of towns

and cities. And further that the legislature may create other agencies to determine this local question, and that it is no constitutional objection to the agencies created by the act under consideration that they are composed of the body of the qualified voters of the city, town or civil district in which the necessary steps may be taken to test the sense of such voters on the subject of such retail traffic."

The whole topic was considered in a very satisfactory manner from an historical point of view in Maryland in 1891, Bradshaw *v.* Lankford, 73 Md., 428. The court's opinion was as follows: "It can hardly be necessary to say that by the Constitution of this State the power to enact laws belongs to the General Assembly, composed of the senate and the house of delegates; and this being so it is a well settled principle of constitutional law that the power thus delegated cannot be redelegated to the people themselves. Our government is a representative government and to the members of the General Assembly the people have confided the power to pass such laws as they, in the exercise of this judgment, may deem best for the public interests; and they have no power to substitute the judgment of others in matters of legislation for the judgment of those to whom this sovereign trust has been committed. But fundamental as this principle may be it is subject to certain qualifications, some of which are well recognized both in this country and in England. No one questions the power of the legislature to charter municipal corporations and to confer upon such corporations the power to pass laws and ordinances in regard to matters pertaining to local legislation. And it seems to be quite well settled in this country at least that, not only may the municipal authorities themselves pass such laws and ordinances, but the legislature may refer laws in regard to local affairs to the voters of the municipality for their acceptance or rejection. Upon the same principle counties, although possessing the general powers of municipal corporations under special charters, are regarded as *quasi* corporations and it

seems to be well settled that questions of local concern, whether, for instance, a county seat once located shall be removed elsewhere, or whether the county shall subscribe to a particular improvement,—these and other like questions of local legislation may be referred to the voters of the county for decision. Upon the same principle, too, it has been held in this State that laws passed under the police powers of the State regulating or forbidding the sale of intoxicating drinks, commonly known as local option laws, may be submitted to the voters of an election district of a county and the operation of such laws made to depend upon the result of a popular vote in said district." [25]

A general study of the various deliverances of the courts touching the constitutionality of the submission of subjects of local government to popular vote will develop the fact that the contingency theory, and the theory based upon the legislature's power in reference to municipalities, as well as the related consideration as to the expediency of a central and distant body submitting questions of purely local concern to the people who are to be directly affected by them in order that administration may be more smooth and effective, bearing with the least possible harshness upon the inhabitants, are closely interwoven. The judges pass almost imperceptibly from one to the other and whatever their own individual views may be as to the law in the case, they are at any rate compelled to recognize that conditional legislation of this kind has existed in all parts of the Republic from the foundation of the government. Whether there is in a strict judicial sense justification for it or not, it is here and it must be reckoned with as a part of us. A great weight of precedent and, perhaps other important considerations which are not empirical, can be appealed to in its defence. The town meet-

[25] For other cases in which this line of reasoning is pursued, cf. Goddin *v.* Crump, 8 Leigh, 120; Slack *v.* Maysville and Lexington R. R. Co., 13 B. Mon. 1; State *v.* Wilcox, 42 Conn. 364; Caldwell *v.* Barrett, 73 Ga. 604; City of Paterson *v.* Society for Establishing Useful Manufactures, 4 Zab. 385.

ing and the referendum are factors in the American system of local government which will remain with us long after the jurist has ceased to seek the grounds for these interesting political institutions.

CHAPTER XIV

THE REFERENDUM ON CITY CHARTERS

One of the most serious of the problems which confront us in the field of government in the United States is met with in our large cities. In these great metropolitan districts of so recent a development there have grown up difficulties with which our type of government has yet seemed unable to cope. The large populations of modern cities and the diverse social interests of all these multitudes of people, coming into conflict as they must to a much greater extent than in rural districts since they must live so close together within a very limited territorial area, have developed a set of problems that put the present machinery of government to a severe test. It is not too much to say that our experiments in the main have been entirely unsuccessful up to this time, though there is hope that within a not very long period the whole system may be reorganized in such a way as to insure very much better results. In what manner this end is to be attained it is difficult to foresee, but all observant persons are convinced that our system to-day is notably deficient in certain important particulars vital to the honest and proper management of city affairs.

The whole political machinery is not infrequently seized hold of by corrupt elements in the city who conduct the elections, occupy the offices and administer public affairs to serve their own private ends. They are restrained very often, it is true, from adopting too bold a course, and, at times, even are constrained to present for leading offices the names of candidates whom citizens holding to higher standards may conscientiously support. When pressed hard by an aroused public sentiment the office-holding cliques will sometimes make

important concessions to save themselves from a defeat which might sweep them from position entirely. Occasionally, indeed, by dint of strenuous endeavor good citizens who encounter peculiar opposition and obloquy in carrying on their patriotic work are able to organize their fellow voters against the more ignorant and the less honest factions. But these get their living from the offices they fill and it is one of the most difficult matters, except at unusual times, to dislodge them. The good citizens from among whom leaders of talent and force have risen up must return to their own pursuits, and so soon as the pressure of an outraged public sentiment is removed the same elements make their appearance again and resume their places as before in arrogant defiance of the forces which stand for better government. The cost and sacrifice of such a campaign by men who must neglect their private affairs and run the gauntlet of unpleasant criticism by interested partisans and a hireling press is so great and the victory so temporary, it is not to be wondered at that the task is seldom undertaken. It has seemed to be better and easier for us to bear with a very great deal of inefficient, if not positively bad and mischievous, government in cities rather than keep ourselves on guard constantly against these strong elements that are always at hand to break through the gates of virtue.

Much of the merit or demerit of a city government has been held to reside in the city charter, the grant of powers received from the State legislature of which each city in this country except Washington is the creation, the latter city standing under Federal supervision by reason of its being the national capital. In the main, in pursuance of some unwritten law, each American city is organized after the same pattern as the Federal and State governments, *i. e.*, like the England of Montesquieu's time. It has been adjudged needful, for some reason, to give a city government three separate departments—executive, legislative and judicial. American publicists have seemed to recognize no other type of government and to this fact it is, at least in some degree,

due that our failures in this field have been so notably discreditable. This peculiar tripartite division of powers in cities has been remarked upon by many excellent students of our institutions [1] and at last there seems to be a distinct tendency at work to correct some of these inherited misconceptions as to the form that should properly be given to a great municipal corporation. The mayor's hands are being strengthened constantly and there is a movement afoot to centralize power in a few officers in a manner that some earlier exponents of our democratic system might have regarded as quite inconsistent with the rules of popular self-government. The movement toward a competent civil service under the direction of some central authority is, however, steadily going forward and there will not probably be any backward step when it comes to be fully understood how great is the need in cities of capable administrators who are held directly responsible to a few authorities possessing real power over them. It is an instance in which the "checks and balances" of government are grotesquely out of place, if past experience in this country is to serve us as a guide. In this view, too, there is much positive corroboration coming from Europe where greater success in municipal government is being achieved by methods that we have been too slow to adopt.

Nevertheless it is possible to commit serious error if we rely too fully on forms and insist upon a certain kind of charter as the only means to good government. A great deal else must be considered, though to avoid impracticable and unworkable systems is, of course, an initial obligation. Panaceas in government have not yet been discovered, and although for this reason too much stress has been laid on what is called the "Home Rule" principle as a corrective for present evils, it is in any event a very interesting development and one that is to claim our special attention in this

[1] Cf. Bryce, *op. cit.*, Vol. I, pp. 623-24; Lowell, *Governments and Parties in Continental Europe*, Vol. II, p. 300.

chapter in so far as it has come to involve a direct vote of the people on their city charters.

It is alleged that the population of a city is often so great and its requirements so specific that it might better be a "free city", holding relations with the Federal government directly instead of only mediately and through the State of which it is now a part. The interests of the rural and urban portions of the State are so different that a legislature common to both can minister well to the needs of neither section of the population. Although the importance of local self-government has been recognized from the beginning in the United States, the power of the State legislature over a municipality is so absolute that gross abuses may easily creep in. The legislature grants not only the general charter of incorporation from which the city derives its self-governing powers, but it may pass bills from time to time amending that charter and may withdraw it altogether at its pleasure, supplanting it with another except as restraint may be found in the State constitution. The interferences of the legislatures in city government have been so frequent and disturbing in recent years that a general effort to check the tendency has been made, either by constitutional provision or by force of precedent upheld by public sentiment, with very interesting results in more than one State of the Union. There has sprung up a desire for Home Rule, the city being allowed to govern itself instead of being governed to so large an extent from the State capital by bills and charters. Home Rule, indeed, has become a very popular "cry" and it is plain, of course, that a serious evil is at hand when the legislatures make improper use of their power, as they can be convicted of doing in nearly all the States in which large cities exist.

To go so far, however, as to recommend that the cities should be entirely emancipated from the supervision of the State is a quite untenable position, though there is a marked tendency for the cities to seek protection of the constitutional conventions which do not meet so often, rather than

place themselves so fully as formerly under the direction of the legislatures. To find some middle ground between complete independence and absolute dependence is a problem that in many States we are now trying to solve. It must be admitted that we are still passing through the experimental stages of the development and have not yet come to any result which may be regarded as generally satisfactory. And most of all it is important to keep the fact in mind that while this reform may have in view a great evil, and may really close one avenue to mischievous municipal government, others are likely still to remain open. If there is Home Rule there must be methods at home to secure proper and efficient public administration, else home rule will not be better than rule at a greater distance. If the responsibility is to be shifted, and what has formerly been done by the legislature even though it was poorly done, is now to be prohibited to it there must be some capable body to stand in its stead. Here it seems we are undertaking to introduce the whole electorate, the citizens at large, whose power is exercised through the referendum. The people are brought into our system, to supplement the legislature either (1) by accepting or vetoing a charter or local government act which the legislature may submit to them; or (2) by approving or rejecting the charter as it is received from some local body designated to draft it, in those States in which an attempt has been made by constitutional means wholly to eliminate the influence of the legislature.

It is a very usual practice for some one high legal authority or a committee of leading citizens to whom the task may be assigned by common assent of the people inhabiting the city, to prepare a charter which is then introduced into the State legislature as a bill and is regularly passed as an incorporation act without change, or at any rate, with very slight amendment and modification. It is but another step to submit the charter to a vote of the people of the city who are in future to be governed by it. Oddly enough this referendum is more usual in small than in large cities. The vote

upon abandoning village or town organization in favor of incorporation as a city under a general law is in effect such a referendum. It is known in this case that if the poll shall be favorable to the proposition the terms of a specific law will apply to the city *ipso facto* without more ado. Similarly when the people of a city of a certain class vote to advance its grade to another class, as when a third-class city becomes a second-class city in States in which cities are all brought under general laws, it is in effect a referendum upon a charter.

We may pass these cases, however, which have been treated fully enough in an earlier chapter, and consider those instances specifically in which the people of a city vote directly to accept or reject a particular charter which has been submitted to them by the State legislature. For example, in Massachusetts various special acts for the incorporation of towns and cities, or acts revising charters previously granted, are referred to popular vote. In 1896 an act to amend the charter of the city of Everett contained the following provision: "This act shall be submitted to the voters of the city of Everett who shall vote 'yes' and 'no' upon the question of the acceptance of the several sections at the annual State election in the present year and only such sections shall take effect as shall, at such election, be accepted by the affirmative votes of a majority of the voters voting on the several sections at said election."[2] Incorporation acts for cities in Massachusetts in recent years have frequently been submitted to popular vote.[3]

In Maryland also it is not uncommon for the legislature to submit incorporation acts or amendments to the charters of towns and cities,[4] and in Tennessee the same practice is followed in certain cases which have been brought to my notice. The charter of the city of Harriman which was

[2] Acts of Massachusetts, 1896, p. 301.

[3] Cf. Acts of Massachusetts, 1896, pp. 205, 312, 364, 394, 419; Acts of 1897, pp. 124, 191, 265.

[4] Laws of 1890, p. 118; Laws of 1894, p. 887; Laws of 1896, p. 608.

passed by the legislature in 1891 [5] was not to become effective until it had been ratified by popular vote. The law said: "This act shall go into effect and be enforced from and after its passage, the public welfare requiring it, to the extent that it is hereby made the duty of the sheriff of Rome County, in person or by one of his deputies, to hold on the nineteenth day of May, 1891, at some public place within the boundaries defined in art. i, sec. 2, of this act . . . . an election at which all persons qualified to vote at the first election provided for in art. iv, sec. 4, shall be entitled to vote, and the question shall be voted upon whether this charter shall be accepted or not, and those of such voters who favor the acceptance of this charter shall deposit their ballots 'For Charter' and those who oppose the acceptance of this charter shall deposit their ballots 'Against Charter', and if a majority of such voters shall vote in favor of the acceptance of this charter, then this act from and after the canvassing of said returns, etc., shall go into effect and be in force in every part thereof."

In Oregon, likewise, charters of municipal corporations are sometimes submitted to the people. Thus an act to incorporate the city of Roseburg says: "This act shall be submitted to the legal voters of the city of Roseburg at a special election . . . . at which said election the ballots shall be written or printed as follows: 'New Charter—Yes', 'New Charter—No'. If a majority of the ballots cast shall read 'New Charter—Yes', then this act shall immediately go into effect."[6]

Furthermore in Vermont acts of incorporation are very frequently referred to the citizens residing within the district to be incorporated,[7] and in Rhode Island in a law to establish "the city of Johnston" it was provided that "this

[5] Acts of 1891, p. 93.

[6] Laws of 1893, p. 458; cf. *ibid.*, pp. 119, 228, 452, 504.

[7] Cf. Laws of 1884, pp. 191, 203, 212; Laws of 1886, pp. 172, 184, 189; Laws of 1888, p. 260; Laws of 1890, pp. 79, 85, 92, 109, 121; Laws of 1892, pp. 156, 174, 213; Laws of 1896, pp. 212, 225, 239, 247.

act shall be submitted for acceptance to the qualified voters of the town of Johnston ".[8] An act to amend and reenact the charter of the city of Sistersville, in West Virginia, which was passed in 1895, was not to take effect " until it be ratified by a majority of the legal voters within the corporate limits of said town of Sistersville ".[9]

In all these States yielding the cases which have just been cited, however, a poll of the people is the exception rather than the rule. It is in Louisiana that a general system has been evolved and introduced into the legislative procedure in respect of charters,—in Louisiana that the legislature has voluntarily surrendered to the people of towns and cities, New Orleans alone excepted, the right to determine under what kind of a local government act they shall be organized. The steps which lead up to the referendum in this State are as follows: (1) The preparation of a charter by means not known to the law, presumably by a private organization of men, or a committee of citizens. (2) The presentation of this charter to the mayor and council of the town or city accompanied by a petition " signed by a majority of the property owners residing within the corporate limits " asking that the proposed new charter shall be submitted " to the duly qualified electors " to be adopted or rejected by them. (3) An election to be held within ninety days from the date of the filing of the petition, preceded by notices published in the newspapers. If a majority of the votes cast at this election are in favor of the new charter the law provides that " it shall become the charter of said city or town and be duly promulgated as such by the mayor ".[10]

In like manner when the charters of towns and cities (barring New Orleans) are to be altered or changed it is contemplated that the amendments shall be submitted to popular vote. Whenever a petition is received by the officers of the city " signed by one-third or more of the property

[8] Laws of Rhode Island, 1897, chap. 516.
[9] Acts of West Virginia, 1895, p. 139.
[10] Wolff's *Revised Laws* of Louisiana, 1896, p. 567; cf. *ibid.*, p. 566.

taxpayers" asking for a change in or an amendment of the charter the proposition must be referred to the people. If more than one amendment be submitted at the same time the means must be at hand for the voters to express their views in regard to each proposal separately. "If a majority of the qualified electors at such election shall approve and ratify such amendment or amendments", the law provides that, "the same shall be appropriately numbered and become a part of the charter and be proclaimed as such by the mayor or other executive head".[11]

It is of interest to note that the legislature here reserves to itself no veto power over these charters which towns and cities may adopt on their own initiation for their own government. It is assumed of course that the charters will be in harmony with general State laws; that a municipality will not actually make itself an *imperium in imperio,* acting over the head of the regularly established State government. Other agencies—such as the courts—failing to apply the necessary restraints a way would still be open to the legislature and one very near its hand. It could at any time repeal the law and enact such other legislation respecting towns and cities as the situation might seem to demand. In no conceivable case could a town or city under this system attain that position of independence which would release it from the supreme authority and sovereignty of the State legislature in the sense that this singular result has been attained in Missouri, California, Washington and Minnesota where the constitutions in specific terms take the charter-making power entirely out of the hands of the legislature and place it with local agents. To charters which are framed by local bodies and submitted to the people under authority derived from the State constitutions the discussion will immediately pass.

There was injected into our legal system when the convention met to frame a new constitution for Missouri in 1875 an entirely new principle, which though it has already

[11] Wolff's *Rev. Laws* of La., p. 565.

been accepted with greater or less modification in four States, can not yet be said to have got itself firmly established in the American practice. This is because of the conflict between authorities which is certain to be engendered by a change so radical and complete. This reform was nothing less than putting the city in a position in which it holds direct relations with the constitutional convention instead of with the legislature. The city adopts its own charter according to certain definite rules prescribed in the constitution. The legislature's authority in a sense ceases, or is at any rate suspended, and although many questions calling for judicial interpretation, which tend to confuse the whole subject, have arisen from time to time, municipalities in some States have actually won a high degree of autonomy by this method.

The provision which found its way into the Missouri Constitution of 1875 was especially designed to benefit St. Louis. At that time the government of the city was viewed with dissatisfaction by very many people. Not only was it desired to eliminate the influence of the State legislature, in so far as it might be expedient to do so, but it was hoped that a plan could be devised to separate the county of St. Louis from the city of St. Louis, the two governments being at that time co-extensive. The proposition finally took this form—that the people of St. Louis should elect thirteen citizens to serve as a "Board of Freeholders". Not only should this board draft and propose a city charter, but it was to be its duty also to prepare a "Scheme" for the separation of the city and county governments, the adjustment of their relations and so forth. To ratify the "Scheme" and charter the assent of a majority of all those electors voting on the two subjects at a special election called for this purpose was necessary, and this vote both propositions received on August 22, 1876, when the referendum was held.[12] It was further provided in the Constitution that

[12] Constitution of Missouri, art. ix, secs. 20-25; State *ex rel. v.* Sutton, 3 Mo. App. 388; State *ex rel. v.* Finn, 4 Mo. App. 347.

amendments to the charter, if they were not presented more frequently than once in two years, might be proposed by "the law-making authorities of the city". They would become a part of the charter if they were approved by three-fifths of those citizens voting on the subject at a general or special election.[13]

Lest the city might consider itself too nearly free under this system, framing and adopting its own charter and amending the instrument as occasion might require, processes which hitherto had been solely within the province of the legislature, the convention made an important declaration. It announced in specific language that "notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State",[14] and also that the "charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri".

Furthermore, a section of a general character was inserted in the Constitution of Missouri of 1875, extending the privilege of framing and adopting a freeholder's charter to any city in the State having a population of more than 100,000, which rank Kansas City afterward attained. In this connection the convention declared again that the charter should "always be in harmony with and subject to the Constitution and laws of the State".[15]

There are ideas here which are not in agreement in spite of an appeal for harmony. The machinery is provided by which a city may make itself independent of the legislature, yet it is declared expressly that the legislature shall still exercise its authority as before, *i. e.*, shall pass laws for the municipality. In Missouri's experience with the freeholders' charter, which in the case of St. Louis dates from 1876, and with reference to Kansas City from 1889, a considerable body of opinion on this point has been handed down by the

[13] Constitution of Missouri, art. ix, sec. 22. [14] *Ibid.*, art. ix, sec. 25. [15] *Ibid.*, art. ix, sec. 16; cf. Acts of Missouri of 1887, p. 42.

courts. Although many questions touching the conflict of authority are still to be decided, a number of issues have been disposed of. The legislature has gradually succeeded in regaining nearly all its former power over these two cities. The privilege, which it was thought would prove so valuable, has been reduced to a rather empty form, as is fully evidenced by the large number of State laws for the government of city affairs that now stand side by side with, and are superior in authority to the city-made charters and ordinances. The Supreme Court of Missouri in 1889 said: "The legislative power of the State is vested in a senate and a house of representatives, and, when it is declared that any city of the required population may frame and adopt a charter for its own government, the right thus granted and the charter adopted is subject to legislative control. The proposition that when any such city has adopted a charter it is out of and beyond all legislative influence cannot be sustained".[16]

The Supreme Court earlier in 1884 speaking in the same sense said: "It is argued that inasmuch as these sections authorized the voters of the city of St. Louis to frame and adopt a charter for the government of the city which, when adopted in the manner therein provided, should take the place of and supersede the charter theretofore granted by the legislature and all amendments thereto, as to all matters of local self-government, an *imperium in imperio* was created and as to such matters the city was emancipated from State and legislative control. . . . . It is true that constitutional authority was given to the people of the city to frame and adopt a charter which should supersede the charter and all amendments to it in existence at the time of its adoption, but the idea that it was thereby intended to create a sovereignty and deny to the State the right of control is, we think, completely overthrown by the limitations contained in the Constitution itself".[17]

[16] State *ex rel.* Kansas City *v.* Field, 99 Mo. 352.
[17] Ewing *v.* Hoblitzelle, 85 Mo. 64.

Although there are some opinions which seem to indicate a deviation from this principle, the rule in Missouri is fairly set forth in the declaration given above, and "general laws" of very many sorts in reference to many different subjects are passed by the legislature which in intent and in effect profoundly influence municipal government in St. Louis and Kansas City.[18]

The second State to adopt a constitutional provision permitting cities to frame their own charters was California. The convention which met in 1879 to prepare a new constitution for that State determined to extend to San Francisco the same privileges which were already enjoyed by St. Louis. The proposition led to much discussion in the convention and, although it had been approved by the "Committee on City, County and Township Organization" to which such matters were regularly referred, it met with considerable opposition from those who pretended to fear that San Francisco would thus be enabled to cut loose from the rest of the State. "This is the boldest kind of an attempt at secession," one delegate said in the convention, and another proposed an amendment to the article to the effect that the city should receive from the State "all the privileges and consideration accorded to the most favored nations", and that the legislature should provide "a duly accredited minister as representative of the State in the said city".[19] So much feeling hostile to the scheme was developed that an amendment had to be accepted by those members of the convention in charge of the measure and it was arranged that the charter, after being approved by the people of the city, should be submitted to the legislature—an important modification of the plan—which, however, must accept or reject the instrument "as a whole without power of alteration or amendment".

[18] For additional cases throwing light on this point in Missouri, see Kansas City *ex rel. v.* Scarritt, 127 Mo. 642; State *ex rel.* Ziegenhein *v.* Railroad, 117 Mo. 1; State *v.* Bennett, 102 Mo. 356; Westport *v.* Kansas City, 103 Mo. 141.

[19] Oberholtzer, *op cit.*, p. 93.

This section of the Constitution as it was adopted by the convention, the people of the State ratifying it at the polls, was to apply to "any city containing a population of more than 100,000", therefore to San Francisco only. The city might elect a board of fifteen freeholders (thirteen in Missouri) who should frame a charter to be submitted afterward to popular vote. If it were approved by a majority of the electors voting on the question of its acceptance or rejection, it must be sent to the State legislature which must approve or reject it as a whole "by a majority vote of the members elected to each house". If it were ratified and became the charter of the city it could be amended "at intervals of not less than two years" on the initiation of the city's legislative body, should the proposed changes be approved by a three-fifths vote of the people and later by the State legislature as in the case of the original charter.[20]

Although San Francisco had failed to avail herself of this privilege in respect of her charter, the legislature proposed a constitutional amendment to the people of the State in 1886 reducing the limit of population from 100,000 to 10,000. This amendment was adopted at a special election held on April 27, 1887, and opened the way to important changes in the fundamental law of a number of the less populous cities of California. At an election in 1890 the privilege was still further extended to include any city in the State containing "more than 3,500 inhabitants". The freeholders' charter was thus brought within the reach of every municipality in California, except the villages and the smaller corporations, for whose government less anxiety is felt by those who interest themselves in city problems in the United States.

The first city in California to adopt a freeholders' charter was Los Angeles. The city's initial attempt to take advantage of this privilege, however, was unsuccessful in that the charter when it was submitted to the people was rejected and another Board of Freeholders had to be elected.

[20] Art. xi, sec. 8, as it stood before it was amended.

The second board drafted a charter upon which a referendum was taken on October 20, 1888.[21] The State legislature ratified it on January 31, 1889, and it at once became the charter of the city, superseding acts earlier passed by the State legislature. On November 6, 1888, the people of Oakland, Cal., approved a freeholders' charter which was submitted to them. Stockton followed with a charter which was ratified by the people of that city on November 20, 1888, while San Diego in December, 1888, elected freeholders who prepared a charter which was accepted by the people at a referendum held on March 2, 1889. Sacramento, the capital city of the State, adopted a freeholders' charter at an election in May, 1892.[22] Grass Valley was the first city in the State having less than 10,000 inhabitants to undertake self-government. This was in the year 1893, and it was closely followed by Napa, Eureka and two larger cities, Berkeley and San Jose. In 1899 three charters were presented for and received the approval of the legislature, these being for San Francisco,[23] a city which had voted on this question on repeated occasions, Vallejo[24] and Santa Barbara.[25]

Up to this time the approval of the legislature has never been withheld from a charter which the people of a city have first ratified, though a favorable vote on the charter in the referendum within the city itself is by no means easy to secure. It has been especially difficult in San Francisco to present the draft of a charter which the people would accept. The first attempt of this kind was made in 1880 very soon after the new Constitution of California was adopted, and only at the fifth election on this subject eighteen years later, or in 1898, was a majority vote obtained in favor of a new body of fundamental law for that city. These elections were held on September 8, 1880, March 3, 1883, April 12,

[21] The vote was 2642 for the charter and 1890 against it.
[22] Statutes of California of 1893, p. 545.
[23] Statutes of California of 1899, p. 241.
[24] *Ibid.*, p. 370. [25] *Ibid.*, p. 448.

1887, November 3, 1896, and May 26, 1898. Each time a board of freeholders had been elected which, sitting and deliberating and voting like a small constitutional convention, prepared and proposed a charter for San Francisco. The charter submitted in 1880 was overwhelmingly defeated. The total vote polled was 23,398, of which only 4,144 ballots were in favor of the charter, while 19,143 were cast against it, the rest of the ballots being "blanks". It is stated that "the most active opposition to the charter of 1880 was on account of a provision introduced in the chapter relating to the health department, which provided that from and after the year 1885 no human body should be buried within six miles of the city hall. This would have closed eleven cemeteries within the city limits. The opposition was led by the Roman Catholic Church, and it was more effective than any other force in insuring the defeat of the charter".[26]

The second charter which was submitted in 1883 met spirited opposition from the professional politicians who are thought to have "counted it out"—*i. e.*, it was defeated after the polls were closed. "The returns were unaccountably slow in coming in, and the later returns were all against the charter. The reports from the first 59 precincts showed a majority of 1,000 for the charter, the final returns gave 32 against the instrument in a total vote of 18,764".[27] Four years later, in 1887, when the third charter was submitted to the people it was foredoomed to failure in the view of most persons, though it called out a larger number of votes than either of the other two charters. The majority against it at the election was about 4,000 votes. There was then a lull in charter making in San Francisco for several years. The next charter was drafted in time for its submission to the people at a special election which was to have been held on April 16, 1895, but the poll was delayed until the general election in 1896, when there were 15,879 ballots cast for the

[26] San Francisco *Argonaut* of November 1, 1897.
[27] *Ibid.*

charter and 17,978 against it, there having been a majority on the wrong side, therefore, of more than 2,000 votes. The total number of votes polled for candidates at this election was 64,815. Thus it appears that every other person who voted for individual candidates for office had so little interest in the subject of the charter that he did not declare himself either for or against it.[28] It was believed that the attention of the voters had been diverted by larger issues. A conviction spread therefore that when next a charter should be drafted, it should be submitted at a special, rather than a general election, and the fifth attempt was made on May 28, 1898, when a majority of about 2,000 votes was recorded in favor of the document, so that the long and tedious contest between the "politicians" and the friends of good government in San Francisco was at last brought to an end. The charter was ratified by the State legislature at its session of 1899. It went into effect on January 1, 1900, and a better era in the political life of the city is now confidently looked forward to. From the beginning the elements in control of the political machine in San Francisco have steadily opposed the charters which have been drafted by the freeholders. They have expressed a preference for the old system of taking municipal law from the State legislature, a method which they understood and by which they could secure for themselves large benefits. It is scarcely to be expected that they will not discover a mode after a while of advantaging by the freeholders' charter, but they will at any rate be under the rather unpleasant necessity of conducting some experiments with popular government in another and an unfamiliar form.

The new charter was supported by a number of clubs and

[28] In a letter from the office of the mayor of San Francisco, explaining the small vote for this charter, I am told: "The interest of the citizens, being centered on the national ticket and the local ticket, naturally diverts attention from the charter and, as a consequence, the one which was passed was presented at a special election at which there was no other issue and experience has shown us that this is the only way an instrument of this kind can be adopted."

organizations devoted to municipal reform and the campaign in its behalf was ably led and actively prosecuted. The "Citizens' Charter Association" issued an address to the people in which they said: "We appeal to all good citizens to endorse the work of their freeholders elected last December and thus crystallize into law an honest effort to save San Francisco from the rule of the bosses, the water, lighting and railroad corporations and allied interests which have daily dealings with the city government and which have in the past and will in the future, unless they are restrained, debauch our politics, rob the people and paralyze the orderly operation of the law. . . . The people can amend it from time to time if it prove defective; but they can never have a new charter offered to them except by again invoking the elaborate machinery required by the constitution for the submission of a freeholders' charter. This is the fifth charter offered to the people. Give it a fair trial and thus do your duty to your municipality."

It is this charter which introduces the initiative and the referendum of the Swiss pattern into the city practice, and makes other striking reforms in municipal government, the working out of which students of political institutions in this country will watch with attention and close interest. Thus while San Francisco was the first city to put forth an effort to secure "Home Rule" in California it is, at this writing, among the last in the State to have availed itself of the privilege extended it by the constitution.

Some interesting points in connection with these self-governing cities of California have been brought out in the judicial opinions emanating from the higher State courts. The Constitution of the State provided that a charter, when it had been approved by the people of the city should be "submitted to the legislature for its approval or rejection", and if accepted by a majority vote of the members elected to each house it should become the charter of such city. The question arose as to whether the charter should not also be approved by the Governor as in the case of ordinary bills.

Four charters had been accepted by the California legislature in 1889 and in each instance this was done by joint resolution. It was argued in behalf of Los Angeles that approval by this method would not suffice. The signature of the Governor of the State should be required as in the case of ordinary legislation. The Supreme Court to which the question came for a decision drew attention to the specific statement in the constitution that the charters should be "submitted to the legislature". Now the Governor was no part of the legislature. He was a part of the general law-making authority of the State, but this was one thing and the legislature was another and a different thing.[29] Therefore the process had been a regular one and the one that had been contemplated by the framers of the constitution. This section of the constitution in the course of its various changes and editings was later amended in this particular. It was specified that the charter should be "submitted to the legislature for its approval or rejection. . . . Such approval may be made by concurrent resolution and if approved by a majority vote of the members elected to each house it shall become the charter of such city", etc. Language so plain will avoid any further question with respect to this interesting, if rather technical point.

In California as in Missouri, it has been difficult to determine just how comprehensive are the powers of the State legislature over cities which have adopted freeholders' charters. To lay down definite rules regarding this matter seems to be quite out of the question. In the nature of the case the task is rendered well nigh impossible. Some rather distinctive results have been arrived at, however, in California by reason of the careless wording of the constitution, as it left the hands of the convention in 1879. In one section, for instance, the constitution declares that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws".[30] This

[29] Brooks *v.* Fischer, 79 Cal. 173. [30] Art. xi, sec. 6.

statement appeared however to be in conflict with the section which extended to cities the right to frame their own charters, free from the intervention of the legislature. In 1890 this seeming contradiction drew forth an opinion from the Supreme Court of the State. The legislature had passed a general law in reference to streets to apply to all the cities of California. Los Angeles, having provisions of a different kind in the freeholders' charter which the people had recently approved and the legislature had ratified, desired exemption from the law, but this was refused. The court said: "A charter like the one under which the city of Los Angeles exists is subject to general laws and a statute like the one now attacked is a general law within the meaning of the constitution. It is useless to discuss the propriety of allowing the legislature to interfere by general laws with the local affairs of a city. The constitution so provides in plain terms and so far as the courts of the State are concerned this must settle the controversy. If the power given the legislature to enact laws of this kind is an evil affecting the rights of the city government the remedy is by amendment of the constitution".[31]

Acting upon the advice of the court the people of the cities concerned were not long in seeking this remedy. Los Angeles was not alone in her dissatisfaction at being put under so much restraint. San Diego and other cities which had adopted freeholders' charters in order to get free of the interfering legislation of the General Assembly were ready to declare that such a restriction went far to nullify the advantages of the new system. And so in fact it did. The constitution declared that the charter which the freeholders framed should be "consistent with and subject to the constitution and laws of this State", that it should be "approved by a majority vote of the members elected to each house" of the State legislature. But it also declared that the charter so adopted "shall supersede any existing charter and all amendments thereof and all *special* laws inconsistent with such

[31] Davies *v.* City of Los Angeles, 86 Cal. 37.

charter", while elsewhere in the constitution it was provided, as we have noted, that all charters "framed or adopted by authority of this constitution shall be subject to and controlled by general laws". How were such inharmonious provisions to be brought into agreement? The proposition was to amend the constitution by striking out the word "special", which I have italicized, so that this clause thenceforth would read: "And supersede any existing charter and all amendments thereof and all laws inconsistent with such charter", the presumption being that "all laws" would include "inconsistent", general laws as well as those of a "special" nature. This amendment was approved by the legislature on March 19, 1891, and was submitted to the people of the State who adopted it November 8, 1892, by a vote of 114,617 to 42,076.

The California cities by this amendment were led to believe that they would enter upon an era of fuller emancipation from the influence of the State legislature. Though to a degree they have been disappointed in this hope, they nevertheless occupy a unique position among their sister municipalities in this country. The Supreme Court of California in defining the rights of the cities in this particular in a recent opinion said: "In all matters which may affect the State at large or whenever any legislation is in its judgment appropriate for all parts of the State it [the legislature] possesses all the legislative power of the State that has not been specifically denied to it, and upon whatever subjects its power to pass a general law exists such general law must be the controlling rule of action in all parts of the State and over all its citizens". A subject of this general character the court held the public school system to be. The laws in reference to public education are of general and uniform application, even in cities which have framed their own charters and may have adopted other and conflicting provisions regarding this question.[32] There can be no escape from the conclusion that the position taken by the judges

[32] Kennedy *v.* Miller, 97 Cal. 429.

in this case is thoroughly sound, and also no escape from another conclusion namely, that absolute rules in this field cannot be wisely established. To make a city wholly free from the State legislature's control is a foolish ideal, as wrong in principle and theory, as it would be impracticable in its realization.

When the convention met in 1889 to draft a constitution for the new State of Washington, California's Constitution was looked upon as a valuable source of legal and political forms for its neighbor commonwealth on the Pacific coast. Many members of the convention had received their civic training in California and among the features which they desired to introduce in the Washington Constitution was this section in reference to freeholders' charters in cities. After a rather prolonged discussion of the subject by the delegates, a provision quite similar to that which is found in the Constitutions of Missouri and California was adopted, to apply to any city in the State containing a population of at least 20,000. With this figure as a minimum it was provided that a board of fifteen freeholders should be elected to draft a charter and refer it to the people of the city for their approval or rejection. If it should be approved by a majority of those electors voting on the subject at a general or special election it would come into effect at once as in Missouri. In Washington there was no provision like that in California, requiring that the charter should be referred to the State legislature for its approval also. Amendments might be proposed by "the legislative authority" of the city, and they became parts of the organic law of the municipality when they were ratified by a majority vote of the people as in the case of the original charter.[33] Seattle, Tacoma, Spokane, and perhaps one or two other cities, have adopted freeholders' charters, in the manner prescribed by the constitution, and the experience of a few years has furnished useful testimony as to the value of this important municipal reform.

[33] Constitution of Washington, art. xi, sec. 10; cf. Ballinger's *Codes and Statutes* of the State of Washington, secs. 734 *et seq.*

Patterning its work after a similar provision in California the convention in the State of Washington fell into the same errors and inconsistencies which in the former State it has been necessary to correct by constitutional amendment. The constitution provided that the charter which the city should frame for its own government should be "consistent with and subject to the constitution and laws of the State". It declared furthermore that all charters adopted by authority of the constitution including freeholders' charters should "be subject to and controlled by general laws", going on to specify that the freeholders' charter when adopted by a vote of the people should "supersede any existing charter including amendments thereto and all special laws inconsistent with such charter". This of course is an exact literal transcript of the corresponding provision in the Constitution of California prior to the amendment of that instrument in 1892. By general laws the State legislature may circumvent the constitutional guaranty to the cities and prevent the attainment of the very object which the makers of the constitution all the while had in view. Up to this time, however, no organized effort has been made in Washington to find a remedy such as has been sought out and applied in California.

The Supreme Court of the State has been called upon several times to fix a boundary of authority between the State legislature and the new semi-independent city, but without marked success. We are asked to remember for example that these provisions in regard to cities are "somewhat unusual and extraordinary provisions and that they are indirect restrictions on the power of the legislature which can prescribe rules for the government of every municipal corporation but these"[34]. The court on several occasions, however, has upheld the legislature in measures to restrain the cities from exercising their independent powers in respect of general State matters. In denying the right of the city of Tacoma to establish a special tribunal and clothe it with

[34] State *ex rel.* Snell *v.* Warner, 4 Wash. 773.

power to try contested election cases the Supreme Court effectually discredited the claim that cities which had adopted freeholders' charters were invested "with all the authority to legislate upon local matters that had theretofore been exercised by the legislature".[85]

And again when it was necessary to call attention to the fact that the right of eminent domain still adhered to the State government, even after the cities had taken advantage of this provision of the constitution and had become in a measure self-governing, the court said: "Because the constitution permits certain cities to frame charters for their own government is no sufficient reason for their assuming a branch of the sovereignty of the State which has no element of municipal government in it.[86]

The fourth State to permit cities to frame their own charters under constitutional guaranty is Minnesota which has only very recently introduced this reform into her system. At the general election in 1896 the people of the State by a vote of 107,086 to 58,312 adopted a constitutional amendment which conferred a large degree of independence upon the cities (and villages) of Minnesota. The amendment was itself amended respecting some slight details in 1898. There are several interesting and notable features of the system as it has been worked out in Minnesota which differentiate it from the corresponding provision in Missouri, California and Washington. There is absolutely no minimum as to population. "Any city or village" may frame its own charter which it is to receive from a board of fifteen freeholders. This board, however, is to be a permanently constituted body appointed by the district judges of the judicial district in which the city or village is situated, instead

[85] State *v.* Superior Court, 14 Wash. 604.

[86] Tacoma *v.* The State, 4 Wash. 64; cf. State *ex rel.* Wiesenthal *v.* Denny, 4 Wash. 135; State *ex rel.* Snell *v.* Warner, 4 Wash. 773; Seymour *v.* Tacoma, 6 Wash. 138; Howe *v.* Barto, 12 Wash. 627; State *ex rel.* Seattle *v.* Carson, 6 Wash. 250.

of being elected by the people as in the other States. The freeholders are appointed for six years (by the original amendment of 1896 for life) and vacancies by reason of expiring terms or for any other cause are filled in the manner in which the members were first chosen. The board must "always contain its full complement of members". The charter must be submitted to the people and a four-sevenths majority vote is necessary for its ratification. The board of freeholders also proposes and submits charter amendments which are adopted when ratified by three-fifths of those voting upon them at a city election, though five per cent of the legal voters of any city or village may originate and can compel the freeholders to refer any desired amendment to popular vote.

Neither the charter nor an amendment needs the approval of the legislature. State supervision and control over the municipality are secured by other means. It is provided in the first place that the charter shall be "in harmony with and subject to the constitution and the laws of the State". It shall "supersede any existing charter and amendments thereof", but it is expressly permitted of the legislature, if it selects to avail itself of the privilege, to pass general laws which shall be in force in the cities and villages coincidently with the freeholders' charters. Four classes of cities may be legislated for in this general way (three classes by the original provision of 1896). These are as follows: (1) Cities having more than 50,000 inhabitants; (2) cities having 50,000 and not less than 20,000 inhabitants; (3) cities containing a population of 20,000, and not less than 10,000, and (4) cities containing 10,000 or a less number of inhabitants. These general laws with respect to the cities within any given class are to be "paramount while in force to the provisions relating to the same matter included in the local charter herein provided for". In no case and under no circumstance shall a provision of a local charter or any ordinance passed by its authority "supersede any general law of the

State defining or punishing crimes or misdemeanors". In this field the State is to be supreme.[37]

As indicating an attempt to exercise a certain restraint over the city and as illustrating the persistency with which we cling to old forms in local government in the United States, it is interesting to note a provision in this new section of the Constitution of Minnesota, specifying that in any charter submitted to the people by these boards of freeholders the scheme of government shall include "a mayor or chief magistrate and a legislative body of either one or two houses". If there are two houses "at least one of them shall be elected by general vote of the citizens".

Summarizing and recapitulating a little, we find that in all four of the States in which the cities may adopt their own charters—Missouri, California, Washington and Minnesota —these instruments are framed by a "Board of Freeholders", *i. e.*, a committee of citizens of the municipal district for which the new scheme of government is intended. This board is composed of fifteen members, except in the case of Missouri where thirteen suffice. In all the States but Minnesota this body is elected by the people of the city with the single special task of drafting a charter. In Minnesota the members are appointed by the local judges and the board is a permanent body the members serving for a term of six years, reappointments being made and vacancies being filled by the same authority.

The privilege is restricted to cities containing a certain definite number of inhabitants, except in Minnesota where all cities and villages, no matter what their size, may frame their own charters. In California the lowest limit is a population of 3,500 (earlier 10,000 and still earlier 100,000); in Washington 20,000 and in Missouri 100,000. In all four States the charters, being drafted, are submitted to the people for their approval, a simple majority vote sufficing in St. Louis and in California and Washington, a four-

[37] Constitution of Minnesota, art. iv, sec. 36; General Laws of Minnesota for 1897, p. 507; cf. *ibid.*, p. v and pp. 473 *et seq.*

sevenths majority being necessary in cities of Missouri other than St. Louis (Kansas City) and in Minnesota. In one State, California, the charter when it has been adopted by the people must be subsequently referred to the State legislature, though for its "approval or rejection as a whole" without power of alteration or amendment in details. Amendments to the charter in three States—Missouri, California and Washington—may be proposed by the "legislative authority" of the city and in the fourth, Minnesota, by the permanently constituted board of freeholders or by five per cent of the legal voters of the municipality. The amendments must be submitted to the people of the city, as were the original charters, and must be approved by them, a three-fifths vote being necessary in Missouri, California and Minnesota, a simple majority sufficing in the State of Washington. In California amendments like the charters must be ratified by the State legislature.

The freeholders' charters are subject to "general laws" of the State legislature by express provision in Minnesota, and by fair implication in Missouri and Washington. In California the constitutional amendment of 1892 has made the cities more free than they earlier were, though in the nature of the case they are still under the legislature's supervision in respect of general State matters. In no one of the four States up to this time have the boundaries between State and local authority been clearly defined and appeals to the courts are frequent with a view to determining disputed points which constantly arise.

It is interesting in this connection to consider a measure looking to the greater independence of cities from the influence of the State legislature which was lately adopted in New York. The convention which met to revise the Constitution of that State in 1894 was appealed to in behalf of the larger cities whose local affairs were being greatly disturbed by legislative interferences, and there were some of the delegates who would have been willing to go so far along the line of Home Rule as to introduce a provision per-

mitting municipalities to frame their own charters. A number of amendments relative to Home Rule for cities were proposed by various delegates to the convention. At least two of these propositions were derived directly from the Constitutions of Missouri, California and Washington.[38] Such a step, however, seemed like a long one. There were many of the more conservatively minded who desired that this subject should be approached from another direction, and a scheme therefore was devised which is in fuller harmony with the representative system of government.

The cities of the State are divided into three classes. The first class includes all cities having a population of 250,000 or more; the second class, cities having 50,000 inhabitants, but less than 250,000; the third class all cities containing less than 50,000 inhabitants. The legislature may pass general laws for all the cities of the State, or for all the cities of a certain class, at will without consultation with any local authority, but in respect of special laws which relate to one city or several cities (not all) of a class the measures must be first transmitted to the particular municipality or municipalities affected by the proposed legislation. When any such bill, whether it be a charter, a bill to amend a charter, or any other special law relating to city government, has been passed by both houses of the legislature it is sent to the mayor of the city to which it refers. He is not authorized to submit the bill to popular vote, but he can arrange for a public hearing, when all persons who have an interest in the subject may appear to present their objections to the measure should they have any. In all cities of the State, except those of the first class, where the matter is entirely in his own hands, the mayor is to act concurrently with the local legislative body in performing this unusual function, and within fifteen days in the name of the city he must return the bill to the State legislature with his approval or his veto.

[38] Cf. Proposed Constitutional Amendments of the New York Constitutional Convention, Vol. I, no. 113 by Mr. Tucker, and no. 139 by Mr. Turner.

If the legislature has already adjourned and the session has terminated the bill with the mayor's certificate is sent to the Governor. Should the bill be accepted by the locality to which it relates, it is still subject to the Governor's veto. He may disregard the legislature's and the city's wishes in such a matter if he believes his course to be for the welfare of the State. Should the bill be disapproved of by the mayor or should it be held by that officer beyond the constitutional limit of time—fifteen days—it may nevertheless again be passed by the legislature. Then too, however, it is still subject to the action of the Governor, as are other bills. It is provided furthermore that any such special law shall plainly indicate in its title whether it has been "accepted by the city", or whether it has been "passed without the acceptance of the city".[89]

Of all the devices which have been proposed as a means of protecting American cities from the undue interference and the increasing meddlesomeness of the State legislatures, whose members through ignorance or lust of power and gain, have driven us to the point of seeking these important constitutional reforms, the system so recently adopted in New York will most commend itself to the judgment of careful students of this subject. As universal as the prohibition of it has become in the past quarter century, we are beginning to realize that in the very nature of things special legislation for localities is sometimes necessary. There are matters of local administration which cannot be satisfactorily brought under a general head. For the good of the city or other community which the system was invented and designed to protect special laws are demanded. To prohibit them was a temporary expedient and a makeshift at best. It was an outgrowth of the irrepressible conflict between the constitutional convention and the legislature which has been in progress for so many years. "The legislature has shown a marked incapacity to perform the great tasks heretofore assigned it, therefore we will restrict it in

[89] Constitution of New York as amended in 1894, art. xii, sec. 4

the exercise of its authority and distribute the power among other agents," argued the makers of the constitutions. It was perceived that great evils had crept into the system of government within the States by reason of the development of modern cities. Through their influence there was a lowering of moral standards in the legislatures, and a serious interference with a natural working out of political problems in these great urban districts as well as in the rural parts of the State. The conventions sought, therefore, to divide all legislation of this kind into two kinds, general and special legislation. What the legislature desired to do in respect of the different localities under its authority the constitutions required it to embody in general laws which should apply not to one specific city, but to all cities or localities of a general class.

I have noted in earlier chapters to what dishonest subterfuges this prohibition has led. Classes have been created which contain but a single city or a single county, and although we may dismiss the subject by throwing the blame upon the legislature which takes this course in order to evade the plain intent and purpose of the law and resume its old-time activity as a creator of evil and confusion in local government, there is no escaping the thought that the legislature is only seeking to do that which it ought to do, and that which there is real need that it should do. No well informed person would contend that the legislature is not the rightful custodian of this authority under our system of government. Municipal corporations are the creations of the State legislatures except in so far as this relation has been altered by recent changes in the State constitutions. In the natural course of events we cannot conceive of the legislatures having lost any considerable part of the full measure of their authority over the municipalities if the power had not been abused, and gross blunders had not been committed in the field of local government. It was an extreme measure which may have had justification in the seriousness of the evil it was meant to

correct, though it bears some resemblance to the case of the owner barricading the windows and doors of his house to keep out marauders, while he must himself enter it by the chimney.

As the prohibition of special laws was a radical step we must regard the attempt of Missouri, California, Washington and Minnesota to solve this problem in the same light. A charter for a city might as well be adopted by the members of a board of freeholders elected by the citizens, if they were persons competent to frame such a charter, as by any other committee of persons. But experience has demonstrated that the city to a greater or a less extent must still be subject to the legislative and institutional system of the State within which it is situated and of which it is a part. In every instance it is recognized that the charter so adopted must be "consistent with and subject to the constitution and laws of the State". Our better judgment tells us, and theory and experience enforce us in the opinion that the city, however great a degree of independence it may have apparently attained, cannot be really free of the legislature's supervising control. Many subjects must still be regulated by uniform laws and judicial opinion has been very generally on the side of the legislature whenever conflict of authority has arisen between the city and the State.

No other view can be entertained despite the fact that State laws oftentimes appear to be onerous to local interests which, being partially freed from outside restraint, would prefer a still larger measure of independence. The freeholders' charter which the people adopt by a plebiscite, it must be acknowledged, is yet passing through its experimental stages and although it marks a tendency, it cannot be said to be an ultimate thing. That, to avoid needless disputes as to authority which the judiciary must constantly arbitrate, some device is required is evident when Minnesota's recent suggestion is taken into account. In that State it is plainly recognized that the city must be under the legislature's direction as before, and the constitution provides

that, though they may have their freeholders' charters cities must at the same time live under "general laws", which in their own province are to be "paramount while in force to the provisions relating to the same matter included in the local charters." There can be no dispute here, for whenever the local charter and the general law overlap and conflict the constitution states specifically that the general law shall have the precedence.

There is still, by the Minnesota system, however, no room for special legislation in reference to cities. To find a system harmonizing this idea with the idea of Home Rule, by which municipalities may in some degree determine the character of the laws passed for their own government, has been reserved for New York. In New York since the constitution was revised in 1894 the enactment of special laws relative to cities is permitted of the legislature, but these laws as bills must be referred to the municipal authorities of the city which is directly affected by them. The mayor of the city may give the bill submitted to him a public hearing and he may veto it, if he sees fit, though his veto is without any effect if the legislature chooses to pass the measure over his negative and the governor chooses to sign it. It becomes a law anyhow, though in that event it is expressly declared in its title, for the information of all whom it may concern, that it was "passed without the acceptance of the city". This constitutional provision legally opens the way to special legislation, when the State legislature may adjudge such laws to be needful. It requires that all such acts shall be referred to the regularly delegated officials within each city, whose government the legislature proposes to change, though it recognizes the supreme authority of the legislature, the governor and other agencies to which the general welfare has been committed by the sovereign people, when it provides a method for the enactment of the law in spite of possible petty local hostility.

Thus while some difficulties are put in the way of special legislation for cities it is not made wholly impossible. The

reference of the bill to the locality to be affected by it affords an opportunity for public discussion of the subject, and should it really be an unworthy measure, it is reasonable to think—at least this is the underlying theory—that it could not be so easily passed a second time in the face of local disapproval. Whatever the final outcome of this interesting contest between the city and the State, regarding municipal government, it is plain that we are all the while tending toward results which promise soon to be more definite, and it may be hoped more satisfactory to all the important interests involved. If New York has taken a step in this direction and has proven herself wise beyond her sister States in the treatment of this question her example, it may be inferred, will be generally followed throughout the country within a very few years.

CHAPTER XV

THE INITIATIVE IN AMERICA

Up to this point we have been devoting our attention chiefly to the referendum, an institution which is clearly of ancient lineage in the United States, but which recently has been making history for itself in some parts of the Union at a particularly rapid rate. Only incidental allusions have been made to the right of the people themselves to initiate legislation, a subject which is to be considered in a general way in the present chapter. It would seem that the referendum could scarcely exist anywhere without the initiative, and the experience of the American States certainly does not mark them out as exceptions to the rule in this respect. In Switzerland the one is closely associated with the other and whenever a reformer of our constitutional system in the United States, of whom there are now so many, proposes the referendum, as a means of clearing the atmosphere of much that is evil in our political life, he in the same breath asks that the initiative shall be given a trial also.

The initiative and the referendum, the initiative being mentioned logically first, have been introduced as inseparable parts of a whole into the legislative practice of South Dakota, Nebraska, California, Iowa and the city of San Francisco and they exist together in fact, if not in name, in nearly all the States of the Union. For what is the system of petition for the passage of a law but the initiative? It is true that the dearly bought right of the people to petition their kings and governors for a redress of grievances, of which we still see many surviving forms even in free states, is not the right of initiative. A petition more or less numerously signed by citizens for the enactment of a law or the

repeal of a law is merely an appeal to a legislature, the members of which will afterward do quite as they please regarding this matter when the time comes for definite action on their part. But the system which has long been with us in the New England towns and in our local communities organized according to the representative principle, prescribing that a certain number of citizens may unite in a petition in favor of some local policy—the laying out of a new road, the vacating of a street or the enclosure of domestic animals, is the initiative in one of its true forms. This needs no particular demonstration, whether the petition of the citizens interested in the settlement of this local question enacts the ordinance and executes the by-law of its own force and at once, or whether it merely brings the subject before the people so that they can vote upon it in the town-meeting or by way of the referendum. In a very great number of cases there must be a moment set when a local ordinance or administrative measure shall come into effect; the enacting authority must name some condition which shall be fulfilled before the vote can be ordered, and the referendum taken. The legislature which desires that its laws in respect of localities shall be self-operating, and which cannot pretend to determine on its own account small details of government in a municipality or other political subdivision of a State, prefers to commit the task to the people themselves, rather than to local boards and officers.

The referendum has been described as a condition precedent to the taking effect of a law; the initiative is a condition precedent to the referendum. The referendum, itself in the nature of a contingency, is made to depend upon a contingency, and that is the filing with representative local officials of a petition signed by a definite number of persons, asking that the citizens residing within a given district shall have the opportunity to say yea or nay on the proposition that it shall be governed by the terms of a certain local by-law which the State legislature has proposed. Thus a prescribed number of signatures from ten to several thousand,

according to the size of the district, its population, the desire to encourage or discourage the taking of the vote, the whims of the legislatures and other controlling influences and circumstances, must be secured in a locality before the election can be held. Sometimes the requirement is for a petition signed by a definite number of persons, as ten freeholders, one hundred qualified voters, two hundred resident taxpayers, etc. Again the law may require a certain percentage of the whole number of qualified electors registered within the district, or of the electors voting at the last election as 10 per cent, 15 per cent, 20 per cent, 25 per cent; or the literal condition may be one-tenth, one-fourth, one-third, two-fifths, three-fifths, a majority or even three-fourths of the legal voters. The legislature instead of enacting the law, requiring the referendum to be taken on a certain fixed date, on regularly recurring dates, or on the motion of local judges, commissioners, mayors and boards, places upon the shoulders of the people themselves the responsibility of deciding when the time has come for an election on the subject. The prohibition of special legislation in recent years and the restriction of the State legislatures' activities, in respect of localities, to "general laws" have exerted a powerful influence to forward this development. For if the legislature cannot adopt the laws which are required by any particular community, and the need for such legislation still exists, the natural tendency is toward the enactment of the great codes of general laws now made so familiar to us in many of the States. These codes have become so comprehensive as to include almost any possible case which from time to time may arise out of the exigencies of local government. The legislature passes the laws without saying whether or not they are needed by all, or by any one of the communities to which they purport to relate. It does not even go so far as to say that the laws shall be submitted to the people in the various districts, for elections are expensive and troublesome and should be avoided when they are likely to fulfil no purpose. An ordi-

nance which would be useful to one community might be without applicability to another, and, furthermore, while without direct interest for a locality at one time might at another time, a few years hence, be of much practical importance to the same locality. The legislature being unable to decide these matters for itself,—whether any given ordinance should be made to apply to the localities or not and if so to which ones, and when, finds a simple way out of its many difficulties in the signed petition, or the initiative. Shall the law which has been passed by the State legislature apply to a particular locality? The people will decide by the referendum. When shall the referendum be taken? The people will decide by the initiative.

Instances are so innumerable that it is a matter of chance in selecting even leading forms. A few will have to suffice since it is a subject so closely bound up with the referendum that to cover the field fully again in this place would be but a repetition of much that has been said in earlier chapters. The initiative occurs in connection with propositions to incorporate cities and villages, to "advance" or "reduce" their grade, to organize levee districts and irrigation districts, to loan the public credit and issue bonds, to levy taxes for special purposes, to change city and county boundary lines, to remove county seats, to make the enclosure of various species of live stock obligatory, to prohibit the manufacture or traffic in alcoholic liquors, to sell public lands and to enact a great variety of by-laws and enforce many different regulations having to do with local management.

In reference to local option liquor laws, for instance, we find that in Connecticut twenty-five "legal voters" of any town may cause an election to be held "to determine whether any person shall be licensed to sell spirituous and intoxicating liquors in said town".[1] The law having been adopted the same number of petitioners may later demand that an-

[1] *General Statutes* of Connecticut, 1888, sec. 3050.

other vote be taken to decide whether or not it shall be rescinded. In Florida "one-fourth of the registered voters" of any county may call for an election within the county on the subject of "prohibition";[2] in Georgia one-tenth of the voters "who are qualified to vote for members of the General Assembly in any county in this State";[3] in Minnesota ten or more legal voters in any township;[4] in Mississippi, one-third of the qualified voters of any county;[5] in Missouri, one-tenth of the qualified voters of any county;[6] in Montana one-third of the qualified electors in the counties;[7] in North Carolina one-fourth of the qualified voters of any county, town or township;[8] in Texas 250 voters of any county or fifty voters of any justice's precinct, city, town or other subdivision of the county;[9] in Virginia one-fourth of those voting at the preceding regular November election in any county, corporation (city), town or magisterial district;[10] in Wisconsin ten per cent of the number of votes cast for governor at the last general election in any town, village or city.[11] On the receipt of a petition signed by twelve qualified voters of a city, village or town in Wisconsin the officers thereof must submit the question as to the sum, greater or less, which shall be paid by dealers for liquor licenses.[12] Likewise in New Jersey a vote is taken to fix the license fee upon the filing of a petition which has been signed by at least one-fifth of the legal electors of any township, town, borough or city voting at the last previous election for Governor of the State.[13]

[2] *Revised Statutes* of Florida, 1892, p. 329.
[3] *Code* of the State of Georgia, 1895, secs. 1541 *et seq.*
[4] *Statutes* of Minnesota, 1894, sec. 1990.
[5] *Annotated Code* of Mississippi, 1892, secs. 1609 *et seq.*
[6] *Revised Statutes* of Missouri, 1889, p. 1050.
[7] Montana *Codes*, 1895, secs. 3180 *et seq.*
[8] *Code* of North Carolina, 1883, secs. 3113 *et seq.*
[9] Supplement to Sayles' *Civil Statutes*, 1888-1893, tit. 63, art. 3227.
[10] *Code* of Virginia, 1887, p. 200.
[11] Sanborn and Berryman's Wisconsin *Statutes*, 1898, sec. 1565a.
[12] *Ibid.*, sec. 1548b.
[13] *General Statutes* of New Jersey, 1896, p. 1810.

The people's right of initiative in respect of changes in the sites of county capitals also claims our interest. Thus in Arkansas one-third of the legal voters of a county signing a petition to that effect may call an election to decide the question of removing the county seat.[14] In California this referendum in any county requires a petition signed by voters equal in number to a majority of the votes cast at the last preceding general election;[15] in Colorado a majority of the taxpayers;[16] in Florida one-third of the registered voters;[17] in Georgia two-fifths of the "poll-taxpayers";[18] in Illinois two-fifths of the legal voters of the county;[19] in Indiana forty per cent of the whole number of legal voters of any county;[20] in Kansas a majority, or three-fifths, or two-thirds of the legal voters, according to the value of the buildings which are already in use by the county and which it is proposed shall be abandoned;[21] in Kentucky twenty-five per cent of the votes cast at the last general election for county officers.[22]

The laws permitting the people of counties and other local districts to determine whether or not live stock shall be allowed to run at large are also brought to a vote through the initiative. In Georgia the election may be held in any county when fifty freeholders petition for it, and in any militia district on the receipt of the signatures of fifteen freeholders.[23] In Iowa on the same subject the petition must be signed by one-fourth of the legal voters of a county;[24] in Kentucky by 100 voters in any county or twenty voters in

[14] Sandels and Hill's *Digest* of the Statutes of Arkansas, pp. 393 *et seq.*
[15] Statutes of 1893, p. 346.
[16] Supplement to Mills' *Annotated Statutes*, p. 307.
[17] *Revised Statutes of Florida*, 1892, p. 281.
[18] *Code* of the State of Georgia, 1895, sec. 391.
[19] Starr and Curtis' *Statutes* of Illinois, 1896, p. 1117.
[20] Horner's Indiana *Statutes*, 1896, secs. 4232 *et seq.*
[21] Webb's *General Statutes* of Kansas, 1897, chap. 26, secs. 1 *et seq.*
[22] Barbour and Carroll's Kentucky *Statutes*, 1894, secs. 915 *et seq.*
[23] *Code* of the State of Georgia, sec. 1777.
[24] *Annotated Code* of Iowa, 1897, sec. 444.

any magisterial district, (a subdivision of a county);[25] in Missouri 100 householders in any county or twenty-five householders in a township;[26] in North Carolina one-fifth of the qualified voters in any county, township or "district or territory whether the boundaries of said district follow township lines or not";[27] in North Dakota one-third of the qualified electors of a county;[28] in Oregon 100 or more legal voters of a county.[29]

In any county in California the board of supervisors may submit the question of establishing a county high school upon receiving a petition signed by "fifty or more qualified electors and taxpayers of said county".[30] The same number of signers may require a poll of the people on this subject in the counties of Nevada.[31] Fifty voters in any school township in Illinois may demand an election on the question of establishing a township high school.[32] Two hundred voters in any county of Ohio may cause a referendum to be taken on the question of levying a tax to found a "children's home" for poor orphans, and children for whose support parents are unable or unwilling to provide.[33] In Utah in cities of the first class 1,000, in cities of the second class 250 and in cities of the third class and towns fifty "qualified voters and property taxpayers", signing a petition therefor may require that a referendum be taken on a proposition to assess a tax for a free public library.[34] Twenty-five signatures suffice to secure an election in any town in the State of New York on a proposal to pay to public school teachers a regular civil pension or allowance after twenty-five years

[25] Barbour and Carroll's Kentucky *Statutes*. sec. 4646.
[26] *Revised Statutes* of Missouri, 1889, p. 186.
[27] *Code* of North Carolina, 1883, sec. 2811.
[28] *Revised Codes* of the State of North Dakota, 1895, secs. 1550 *et seq.*
[29] Laws of Oregon of 1893, p. 89.
[30] Statutes of 1891, p. 57.
[31] Statutes of Nevada, 1895, p. 28.
[32] Starr and Curtis' *Annotated Statutes*, p. 3660.
[33] *Revised Statutes* of Ohio, 7th ed., 1896, sec. 929.
[34] Laws of 1896, p. 144.

of continuous service.[35] Fifty taxpayers in any county in Nebraska can demand an election on the question of paying bounties for the destruction of wolves, wild cats, coyotes and mountain lions.[36] One hundred voters in any county in West Virginia can compel the local authorities to take a poll of the people on the proposition to tax dogs, the proceeds of the levy to be used for indemnifying the owners of sheep whose flocks have been attacked and injured by dogs.[37] In the cities and villages of Wisconsin ten per cent of the "duly qualified electors" may initiate and cause a vote to be taken on a local by-law to regulate the sale of street railway, water, lighting and other public franchises.[38] An act introducing new rules respecting the civil service in cities in Illinois requires a petition which is signed by 1,000 voters.[39] County courts in West Virginia on the receipt of a petition containing the signatures of 100 voters must submit a proposition for "an alternative method of constructing and keeping in repair the county roads".[40]

Innumerable instances of this kind, similar in principle if varying in matters of detail, might be cited here, though it could add little to the discussion of this branch of our subject. As well might I have referred to a thousand other cases as to these. But to name a greater number of examples would be as tedious as it would be devoid of useful purpose, for enough has certainly been said to indicate how widely and generally the initiative is employed in this country, and how necessary a feature of our system of local government it has everywhere become, especially in the Western States. Sometimes, it should be remarked, the initiation of a measure which the legislature has proposed to the localities is not left solely to the people, but the law provides that the county commissioners or other local repre-

[35] *Revised Statutes* of New York, 9th ed., p. 3089.
[36] *Compiled Statutes* of Nebraska, 1897, p. 73.
[37] *Code* of West Virginia, 3rd ed., 1891, p. 600.
[38] Sanborn and Berryman's Wisconsin *Statutes*, sec. 940j.
[39] Starr and Curtis' *Statutes*, p. 826.
[40] *Code* of West Virginia, 3rd ed., p. 332.

sentative officials "may", or upon receipt of a petition signed by, say fifteen per cent of the qualified electors of the county, "must" submit the question to popular vote. When this provision occurs in the law local magistrates may of course anticipate a petition, acting in the matter on their own responsibility without authorization from any other source.

The American experience with this institution has taught us some lessons and not least useful among them is one which has been emphasized in Kansas, Indiana, Kentucky and Arkansas, though the same tendency is manifested in other States. The initiative has sometimes proven itself too embarrassingly democratic, even as measured by the standards of our very liberal political system of which it has now become so familiar a part. When important questions which closely affect the public welfare are to be determined the legislature has found it advisable to hedge in upon the privilege. In respect of subjects upon which the people might ask for a plebiscite too frequently it has become necessary to apply some effective restraints. Just as with the referendum when increased majorities, *e. g.*, a three-fifths or a two-thirds vote is demanded, and when elections on the same subject oftener than once in, say, two or five years are prohibited, so with the initiative devices are employed to lessen its democratic influence and force. If there is reason to think that the people will make too free a use of the right to call elections on local propositions the number of signatures which must be appended to the petition is increased. If there is no such prospect the number is always smaller. In not a few cases more signatures must be secured for the petition than the number of votes needed subsequently to pass the measure in the referendum. Thus the people are effectively held in check since it is no easy task, especially in a large and populous community, to secure a long list of signatures unless there is serious purpose behind the movement, and a general desire that an election should be held.

Kansas furnishes a striking instance directly in point.

The people of this country seem to be almost wholly lacking in a genius for quietly and properly attending to the small duty of choosing locations for their county capitals. In many States of the West they have made it plain that they are not disposed happily to submit to the decree of any representative body respecting the choice of a site for the county buildings. Bloody riots led by the defenders of the claims of rival towns have not infrequently occurred. In most States the constitutional convention or the legislature now refers the whole subject to the people of the respective counties, authorizing them to place the buildings at whatever spot may seem to them, in their wisdom, to be best suited for such a purpose. Nevertheless unfortunate differences still arise from time to time and wherever too great freedom is allowed to the people in this matter there are likely to be unpleasant if not serious consequences. The problem is simply this, to find some method by which any group of speculators in land whose pecuniary interests centre about a certain town can be prevented from subordinating the public welfare to their private ends. In nearly all the States the number of signatures which must be assembled on a petition for a county-seat election is relatively high and the referendum can be taken not oftener than once in a rather long period of years. The method employed in Kansas is novel and ingenious. A simple majority of the legal electors of a county signing a petition for the removal of the county seat can demand an election on the subject when the buildings on the present site have cost the county less than $1,000. If, however, they shall have cost $2,000 or more a petition signed by three-fifths of the electors is requisite, and if more than $10,000, and if they have been in one place continuously for at least eight years the names of two-thirds of the qualified voters in the county must be secured. In the latter case, furthermore, the proposition when it is submitted to the people in the referendum must be approved by not less than a three-fifths vote.[41] In

[41] Webb's *General Statutes* of Kansas, chap. 26, secs. 1 *et seq.*

Georgia a petition for a poll of the people on the question of removing a county seat must be signed by two-fifths of the "poll-taxpayers" and in the referendum which follows a two-thirds majority vote is required. Moreover the election cannot be held more frequently than once in five years.[42]

None of these restraints seems to be quite so rigorous, however, nor does any manifest so much psychological knowledge of men as the system by which the signers of a petition for an election are made to deposit from their own private purses a sum of money to reimburse the county for any loss which may thereby be entailed. As a means of putting a brake on popular ignorance and precipitancy this is a rather new development in a democracy. It finds its close counterpart in South Carolina where after struggling for a long time with the lynching evil and finding our system of government barren of remedies, we have turned upon the people whom we have not been able to check through the church, the school or the courts and have told them that if they cannot wait for the established judicial agencies to take their natural course with a prisoner or suspect they shall be held financially responsible for the results of their vengeful folly. The convention which framed the Constitution of South Carolina of 1895 puts the pecuniary burden of a lynching upon the taxpayers of the county in which it occurs. The Constitution provides that "in all cases of lynching when death ensues the county where such lynching takes place shall . . . . be liable in exemplary damages of not less than $2,000 to the legal representatives of the person lynched". As the counties in which such savage outbreaks occur are usually not wealthy the hope is entertained that the taxpayers who may compose the mob will hereafter reflect a little before assisting to break open the jail door or throw the rope over the tree-limb at a Carolina "lynching party", and that taxpayers who are not members of the mob will use their utmost endeavors to dissuade their neigh-

[42] *Code* of Georgia, 1895, secs. 377 *et seq.*

bors from taking a step which may prove to be pecuniarily so expensive to them all. If such a law would seem to give an exaggerated importance to the material motives in men it will be well to remember, perhaps, that the true test is found in results. The need is for restraint of popular impulse and passion while holding fast to democratic forms, and to attain this end taxation, if as potent, may be quite as defensible as any other method.

So likewise when it is necessary to hold the people at bay in the initiation of legislation, while still allowing them to retain and exercise this right, they are sometimes made financially liable for their indiscreet deeds. In Arkansas, when in 1893 it appeared to be expedient to modify the rule of 1873 by which one-third of the qualified voters of any county might order an election on the question of removing the county seat, pecuniary checks were introduced. In 1893 it was enacted that in any county in Arkansas having a court house which "originally cost $10,000 or more or a court house and jail which together originally cost $10,000 or more" the petitioners for a removal of the county seat should deposit with the treasurer of the county "$5,000 in United States currency". This sum was to be used by the county "in erecting a new court house", if the people at the election should vote in favor of a change of site. If, however, the vote were against the proposed change the sum which had been deposited by the signers of the petition must be made good to them again. Moreover as a further discouragement to frequent elections on this subject it is provided in Arkansas that when a county seat has once been removed in compliance with the act its location shall not be changed a second time until after the expiration of ten years.[43]

In Indiana also some very severe restrictions hedge about the initiative and the referendum in respect of the relocation of county seats. By a law of 1885 no capital is to be removed

[43] Sandels and Hill's *Digest* of the Statutes of Arkansas, 1894, p. 396.

and relocated until it has been in its present site for at least twenty-five years. When the appraised value of the county buildings exceeds $20,000 a change of site is altogether prohibited. In permissible cases forty per cent of the whole number of legal voters of any county signing a petition therefor may demand a referendum on this subject if they first deposit with the county commissioners a deed for at least two acres of ground as a site for the new buildings, with legal evidence of the validity of the title to the land, an affidavit that the signatures to the petition are genuine, the sum of $200 to pay for architect's plans and a bond made payable to the State of Indiana to cover the expenses of the election. Moreover in the referendum which follows no less than seventy per cent of the votes cast must be in favor of the change of site in order to make it valid, a series of difficult conditions which perhaps could but rarely be fulfilled.[44]

Similarly in Kentucky by the "local option" law of 1894 a number of signers equal to twenty-five per cent of the votes cast at the last election may ask for a poll of the people on the question of prohibiting the liquor trade in counties, cities, towns and other local districts of the State. But it is provided that the county court shall not issue an order authorizing the taking of the vote "until the persons signing the petition have deposited with the county judge in money an amount sufficient to pay for printing or posting advertisements as provided for [in the law] and the fees of the clerk making entries in the order book". And in no case may the election on this subject be held oftener than once in three years.[45] In local elections for the restraint of domestic animals the Kentucky legislature also requires a deposit of money. The law declares that "no polls shall be opened unless the petitioners shall deposit with the county court at the time the petition is filed an amount

[44] Horner's Indiana *Statutes*, secs. 4232 *et seq.*; cf. *ibid.*, secs. 4235b *et seq.*

[45] Barbour and Carroll's Kentucky *Statutes*, sec. 2559.

sufficient in the judgment of the court to defray the expenses of the election upon this question ".[46]

The initiative has a place in our local political practice in still another form. It occurs with the referendum in the cases which we have just noted; sometimes too it occurs alone. In many instances the contingency which attends the taking effect of a law in respect of localities is merely a petition containing the signatures of a majority, or other prescribed number of citizens. This is a very old form of the initiative in America. It was a method of taking the popular sense before the referendum had yet appeared on the scene and it can well be asked why when the law requires a petition which is signed by at least a majority of the citizens, the same number that usually suffices to adopt a measure in the referendum, it should also be adjudged necessary to poll the people on the subject? There is probably no answer to this question except this—that our system has been found to be too democratic and while not desiring to abolish it entirely we have had to introduce devices to make its operation less easy and smooth. It is much harder to get the signatures of a majority of the citizens of any but the smallest communities than it is to secure the votes of the same number of men at a public election. Again it is much harder to get the names of two-thirds of the voters than of a simple majority and to couple the petition with the referendum and say that one must follow the other, adding, perhaps, that the petitioners shall advance enough money to pay the cost of taking the vote before the election will be advertised, is to put a most effective check upon "government by the people". So much has been said in recent years in regard to the desirability of making direct legislation by the citizens easy since they, being the theoretical source of government, can do us no wrong that such a manifestation is of peculiar interest. It is an instance perhaps in which the people have locked their own wheels.

[46] Kentucky *Statutes*, sec. 4647; cf. Sandels and Hill's Arkansas *Statutes*, sec. 7277, and *Compiled Statutes* of Nebraska, 1897, pp. 1591-92.

Initiation by a small percentage of the voters—a number less than a majority—is a natural accompaniment of the referendum in local matters. It serves to render the system self-operating, and to a degree automatic, in that the petition determines when the referendum which the legislature has authorized shall be taken. It is a mere formal proceeding saying nothing for or against the adoption of the law. The law is accepted or rejected by the people later on, they being the law-makers when they vote upon it in the referendum. In the case of the petition which is not followed by a poll of the citizens it is, as it were, the initiative and the referendum combined in one. The people are still the law-makers, but they sanction the law simply by signing their names on a sheet of paper instead of by depositing their ballots at a polling station. Thus in any county in Arkansas a majority of the taxpayers signing a petition may require the county court to purchase a farm and erect upon it a house of correction for misdemeanants convicted of petit crimes.[47] In Arkansas, school lands, *i. e.*, the sixteenth section of any "congressional township", may be sold on authority derived from a written petition which is signed "by a majority of the male inhabitants of such township".[48] In counties and subdivisions of counties in Arkansas on receipt of a petition requesting that this be done, signed by a majority of the qualified electors, the county must grant an order obliging owners to enclose their live stock. The order may be rescinded again by the same process.[49] In Illinois a petition containing the signatures of two-thirds of the legal voters of a township will validate the sale of school lands without a poll by ballot. The names must be affixed in the presence of two adult citizens of the township both of whom, witnessing the document, must make affidavit as to the genuineness of the signatures.[50] In Kansas a petition signed by two-thirds of the legal voters of any county makes effective within the county a legislative

[47] *Digest* of Arkansas Statutes, p. 382.
[48] *Ibid.*, sec. 7114. [49] *Ibid.*, secs. 7274 *et seq.*
[50] Starr and Curtis' *Annotated Statutes*, p. 3719.

provision in regard to the enclosure of domestic animals.[51] By a law of 1896 two-thirds of the qualified voters of Vicksburg, Miss., signing a petition therefor could require that bonds be issued on the credit of the city to an amount not exceeding $25,000 to defray the expense of erecting buildings for the Medical Department of the University of Mississippi.[52] In Nevada a majority of the taxpayers, or taxpayers representing a majority of the taxable property in cities, unincorporated towns and school districts may join in petitioning for a tax to raise money to establish and maintain free public libraries.[53] Instances of this kind in the various States are by no means rare, the sense of the people in regard to propositions and local ordinances being taken usually, however, by ballot at the polling places, a much more convenient method of securing an expression of public opinion.

There are then, as we have seen, three courses open to the State legislature when it desires to legislate for a locality, and it cannot, or is itself unwilling to pass a definitive law. (1) It may make the going into effect of the law depend upon the will of local representative officials. (2) It may require a polling of the people of the district to be affected by the act, the latter coming into force or not, according as the vote is in favor of or against the measure. The legislature (a) may itself fix a certain date when the referendum shall be taken; or (b) it may require the election to be held on the initiation of a certain number of the citizens of the district concerned who shall petition for the vote; or (c) it may resign to local officers the duty of determining when the people shall be polled respecting any given subject. (3) And finally the legislature may specify that the conditional act which it passes shall go into effect in a local district when a majority of the legal electors residing therein have signed a paper and petitioned for the enforcement of the law.

[51] Webb's *General Statutes* of Kansas, chap. 138, secs. 6 *et seq.*

[52] Laws of 1896, chap. 118.

[53] Statutes of Nevada of 1895, p. 79.

These three forms often exist side by side in the same State. They are not inconsistent. To determine which shall be employed in any given case is a question of expediency and of the existing custom in the matter,—often too it would seem of pure chance. In respect of many classes of subjects local representative officials decide when the law shall become operative within the locality; respecting many others, as we have noted on earlier pages, the referendum with or without the initiative is employed, and in not a few cases the presentation of a petition signed by a majority of the citizens without a vote by ballot is the condition which the legislature attaches to a law's going into effect.

But it will be said of course that a petition of this kind is not the initiative of the true Swiss type. The petition is not the initiative in the form that the advocates of this feature of popular government desire to see it introduced into this country. The right of initiation includes the right to demand a vote of the people, not only on laws already proposed or passed by the representative legislature, but also on new measures. The right of initiation is the right to initiate the law as well as the election for and against the law. It is a democratic agency by which a minority party and elements which are without representation in the legislature may force the latter's hand and compel it to submit any desired measure to popular vote. The initiative is a lever by which the people may exert power upon their "governors", even if these be no other persons than those whom the people at intervals themselves elect. Such is the purpose of the reform as it comes recommended to us by the democratic-socialist leaders of whom we now have so many in the United States. Very well. We have the initiative in this form in America also; in some States it is true only as a result of considerable agitation of the subject on the part of these outspoken advocates of "direct legislation" as in South Dakota, Nebraska and San Francisco, but also as a natural development of our town meeting principle as in Iowa and California.[54]

[54] *Ante*, pp. 307 *et seq.*

By an amendment to the Constitution which was adopted by the people in 1898[55] both the initiative and the referendum, closely patterned after the Swiss forms were introduced into the political practice of South Dakota. The system was further worked out and developed by an act passed by the South Dakota legislature in 1899.[56] In that State the people may demand that a vote be taken on all laws which have been approved by the legislature except those of immediate urgency. If a number of electors equal to five per cent of the votes cast for Governor at the last preceding general election file a petition with the secretary of state within ninety days after the adjournment of the legislature, asking that any law which it may have passed during that session shall be submitted to the people of the State, a referendum must be taken on the question of the adoption or rejection of the measure. Not only this but five per cent of the electors of the State may propose any measure that they may deem to be for the public welfare and the legislature receiving the petition must submit it to popular vote. In either case the petition, whether for a vote on a new law which the people have proposed, or on a law already passed by the legislature, must be signed by the citizens in person and in addition to the name must give the place of residence, the occupation and the post office address of each individual signer of the paper. The petition, too, must contain the substance of the law upon which it is desired that the referendum shall be taken. A majority of all the votes cast both for and against the measure is decisive, and if the law is approved in the referendum it goes into effect at once.[57] In the same way in South Dakota by-laws and ordinances passed by the local legislative bodies for the government of their respective towns and cities, except "emergency measures", are submitted to a vote of the people in the municipalities to be affected by them. Qualified electors of the municipality equal to five per cent of the votes cast for the "highest executive officer" of the city or

[55] Session Laws of South Dakota, 1897, p. 88.
[56] Session Laws of 1899, pp. 121 *et seq.* [57] *Ibid.*

town at the last general election may propose an ordinance and have it voted on by the people, as they may also demand within a certain period after its passage a poll of the people on any by-law already enacted by the local representative assembly. A majority of the votes cast will approve the measure, the rules respecting the filing of the petition and the taking of the vote being in all essential respects similar to those which prevail when the initiative and the referendum apply to the State at large.[58]

By the new charter of the city of San Francisco a number of electors equal to fifteen per cent of the votes cast at the last preceding election may propose local ordinances and demand a poll of the people upon them. Any such ordinance must be set forth and described in the petition and if it is approved by a majority of those who attend at the polling booths and vote on the proposition it at once becomes a law of the city. It is specifically required that "the signatures to the petition need not all be appended to one paper", and each signer in writing his name must add his place of residence "giving the street and number", so that he may be identified. It is specially provided also that the local representative legislature shall not repeal or amend measures which the people thus adopt, but it may on its own initiation submit to popular vote propositions for the rescission or amendment of such laws.[59]

Coming to Nebraska, the law which was passed by the legislature of that State in 1897 introduces the initiative and the referendum by those names, and in the Swiss form, for cities and "other municipal subdivisions of the State", a designation which we are told includes counties, villages, towns and school districts. In these local districts fifteen per cent of the voters may demand a vote on any proposed ordinance at a general election; twenty per cent may have the subject submitted at a special election. If the local representative legislature alters or amends the initiated measure, after it is

[58] Session Laws of South Dakota, 1899, pp. 121 *et seq.*
[59] Charter of San Francisco, art. ii, chap. 1, sec. 20.

received and before it is submitted to popular vote, the original ordinance and the amended bill shall together be referred to the people, so that they may make their choice or, if it be their will, reject both propositions. In the same manner a referendum may be demanded on any by-law proposed and passed by the local legislative boards,—at a regular election by a petition signed by fifteen per cent of the voters of the city, county, etc., and at a special election by a petition containing the signatures of twenty per cent. of the voters. "Urgent ordinances" are excepted from the provisions of the act and may be passed definitively to go into effect at once.[60]

Of a purely American development, the outgrowth of native conditions existing before the wave of Swiss influence swept over the country, is the initiative as we find it in California and Iowa. A law of California contains the following interesting provision: "Whenever there shall be presented to the board of supervisors a petition or petitions signed by legal voters of said county equal in number to fifty per cent of the votes cast at the last preceding general election, asking that an ordinance to be set forth in such petition be submitted to a vote of the qualified voters of such county it shall be the duty of the board of supervisors by due proclamation to submit such proposed ordinance to the vote of the qualified voters of such county. The election shall be conducted and the returns canvassed in all respects as provided by law for the conducting of general elections and canvassing the returns thereof. If a majority of the votes cast upon such ordinance shall be in favor of the adoption thereof the board of supervisors shall proclaim such fact and thereupon such ordinance thus adopted shall have the same and equal force and effect as though adopted and ordained by the board of supervisors."[61]

This "board of supervisors" is a body composed of five members who are elected by the people of each county by the

[60] *Compiled Statutes* of Nebraska, 1897, pp. 588 *et seq.*

[61] Statutes and Amendments to the Code of California, 1893, p. 348.

system, to borrow the French term, of *scrutin d'arrondissement* and not *scrutin de liste*, the latter being the method usually employed in making choice of county government boards in the American States. The supervisors hold office for four years and to them are committed very extensive legislative and administrative powers with respect to local matters of various kinds.

Likewise in the State of Iowa the board of supervisors may submit to the people of any county at a regular election, or a special election to be called for that purpose, "the question whether money may be borrowed to aid in the erection of any public buildings and the question of *any other local or police regulation* not inconsistent with the laws of the State". Propositions for the repeal of local regulations may be referred to the people by the board of supervisors in the same manner. Furthermore the board "shall", *i. e.*, it must submit "the question of the adoption or rescission of such a measure when petitioned therefor by one-fourth of the voters of the county". Whether the vote is taken on the motion of the board or of the people themselves "on being satisfied that a majority of votes were cast in favor of the proposition" the supervisors "shall cause the same and the result of the vote to be entered at large in the minute book and the proposition shall take effect and be in force thereafter".[62]

Summarizing these results for the initiative we find, therefore, that one State, South Dakota, grants the people the right of initiative on the large matter of State laws. The petition must be signed by a number of electors equal to five per centum of the votes cast for Governor at the last preceding general election, while with respect to the initiative in local districts on local by-laws and ordinances the showing is as follows:[63]

[62] *Annotated Code* of the State of Iowa, 1897, secs. 443 *et seq.*

[63] It must be noted always of course that the initiative and the referendum on municipal laws in South Dakota, Nebraska, California, Iowa and San Francisco apply to local laws locally enacted, not to local laws received from the State legislature such as we have been considering in the earlier part of this chapter. Cf. *ante*, p. 307.

Unit.	Number of petitioners necessary to initiate.
South Dakota..Cities and towns,	Five per cent of the votes cast at the last election.
Nebraska .....Cities, counties, towns, villages, school districts, etc.	Fifteen per cent of the voters for a general election ; 20 per cent if the submission is to be made at a special election.
California .....Counties.	Fifty per cent of the votes cast at the last election.
Iowa ... .Counties.	One fourth of the votes cast at the last election.
San Francisco...City.	Fifteen per cent of the votes cast at the last election.

The fact must be kept in mind therefore that if the referendum is not unknown to our political system in the United States, so likewise is the initiative no stranger among our institutions. Both have been developing side by side until they have become familiar to us by general usage in all but every State in the great American Republic.

CHAPTER XVI

THE REFERENDUM VS. THE REPRESENTATIVE SYSTEM

It will now be desirable, I think, to summarize and review in a final chapter the results of our studies and investigations. It would not be safe, perhaps, to make any prophecies regarding the future of the initiative and the referendum in the United States. The philosophical movement led by J. J. Rousseau, which had for its natural consequence the upheavals in the latter part of the eighteenth century, was a mere vague and fanciful appeal for a new political order, in which the people would receive back their own from unauthorized agents who had got into control of the machinery of government and maintained themselves there through the complexity of the political organization. It was a protest aimed against monarchical forms, as they were these forms that then prevailed nearly everywhere. Although primary assemblies were spoken of as the ideals in government it was not supposed, even by Rousseau himself, that Paris or France could be ruled by a town meeting, and a ballot system of the modern type had not yet been devised. The people were still to act through representatives, albeit as a necessary evil from which it was thought there could be no escape, at any rate in populous countries of a large territorial area. The result was a demand for a representative system with the elimination of kings, governors and indeed all magistrates who were not directly elected by the people and were not directly responsible to them. The struggle which followed was between those who wished to organize this representative system after two different plans. The radical wing declared its preferences for a government by an unchecked convention of a single house which was to be legislature, ex-

ecutive and judiciary combined in one. The other wing, led so ably in this country by John Adams, aimed to give the new government a more complex form so that it might withstand the first gust and effectually perform the great tasks set for it to do while at the same time owing the necessary responsibility to the people. That this contest was a bitter and prolonged one, I think I have shown in this essay, in some early chapters from the constitutional history of Pennsylvania where the struggle centred on this continent. England, unmoved by the storms which have shaken France, has gone forward by a gradual process developing a type of government that is greatly admired in all parts of the world. Our own government, especially as a Federal model, has attracted much attention and in one form or another the representative system with the main features of a congress or parliament elected by the people, and a president or king with a cabinet which is usually responsible to the parliament, has spread over the civilized earth being incorporated in all the leading constitutions of Europe, America, Africa, Australasia and even in Japan.

Although parliamentary government has been so widely introduced and has now so generally come to supersede other forms of government in which the people are not directly represented in a legislature, the system is not without its weaknesses. These have manifested themselves in a great variety of ways. They have pressed themselves on the attention of thinking men throughout a long period of years in many different lands, and it is natural that some corrective should be eagerly sought. It is very generally understood that any system in which the people are not represented in a parliament, and by which they must take and obey such laws as others make for them, is quite distasteful to most modern populations. If such tractable peoples can be found and they are willing peaceably to be governed by a few men it is not to be denied that the state may be so organized as very much to advance the social interests of the inhabitants. In recent years the progress made by the Russian nation and by

the Germans, among whom there are still traces of arbitrary power adhering to the crown, has been very great. A government which anticipates the people's wants and provides for them, can do a great deal to advance civilization in one way or another. A great modern socialistic engine, it can carry roads and railways into wildernesses, erect telegraph and telephone lines, build schools, markets, hospitals, post offices and even employ the people in factories, mines and on public works, so as to create an appearance of prosperity and thrift. Whether it is not better for a race to work out its own destiny without aids of this kind remains an open question which social philosophers will long continue to discuss. It is a fact, however, that when a people have once come to know and to appreciate the privilege of being able freely to advance without the aids or interferences of a power which is set up over their heads it is hard to get them again to submit with good grace to any body of rulers or bureaucrats, no matter how much the latter may protest that they are working solely in the public interest. In the presence of great modern standing armies under strict organization, revolutionary sentiments may be suppressed and the "state" may pursue its course more or less independent of public opinion. These, however, are not the conditions which should naturally rule in a society and a representative system of popular government is to-day a factor which must be reckoned with nearly everywhere.

The evils which have developed in this system are not small ones. The growth of dangerous groups in parliaments, such as those which gather under the name "socialist", the advocates of unsound forms of currency, the thoughtless popular leaders who clamor for a war of conquest in order to please the multitude and ride back on a wave of public enthusiasm to another term of office, the selfish and the dishonest who would use the government to enrich themselves personally and the class which they represent, the "Boss" and his men who are the curse of the system in America—all these are manifestations which cause reflective

people to pause and tremble for the future of representative government. If a legislature chosen by the people is to develop traits like these there are plainly very great evils at hand for which we are justified in seeking some drastic remedy. If the people cannot select from among themselves delegates who are above a desire to overturn the present social order, or to perpetuate themselves in office, or to steal from the state and from society, or to cheapen the currency, or to precipitate a war for the sake of the excitement and exhilaration that it yields to the lowest classes of the inhabitants, parliamentary government must indeed have passed through the day of its greatest glory and usefulness.

In the United States we have arrived at such a point that political organizations under party names are created to deal and traffic in offices. The political organization like a business organization has its chief who appoints his subordinates and this group, each member faithful to the one over him under penalty of discharge from his place, so controls the party and the electoral machinery that no one can get a public office of profit or honor in the state except through the Boss. This extraordinary personage, wholly unknown to the constitution, levies upon private individuals and corporations, and makes and unmakes laws as they pay him for doing. The system is so well established and it is in practice so difficult to uproot the great evil, that influential citizens rather than put themselves to the trouble and expense and undergo a campaign of personal abuse which would be conducted against them by the Boss and his men, prefer to sit down quietly and submit unless the suffering perchance should become so acute as actually to be no longer tolerable. We see public money being wastefully spent, taxes raised to be devoted to unworthy ends, laws passed which treat one interest unjustly at the expense of another until we have become callous to the sight. The good citizen realizes by experience that it would require the possession of unusual political talent and ability were he to organize an effective opposition movement to overthrow this peculiar system, the expenditure of

very large sums of money—this is one of the most expensive forms of patriotism in the United States—while he and those who enlisted to aid him would be assailed and ridiculed on all sides, on the public platform and in the Boss' subservient press. Even with all the best elements in the community co-operating with him and the newspapers and the clergy on his side, he still could not hope to win the battle unless he went to the real source of things and perfected his organization in such a way in each local district and precinct that he had control of the "machinery" for making nominations and conducting the elections. How little influence the press seems nowadays to exert in such matters has been demonstrated over and over again in "reform" campaigns in New York, Philadelphia and other large American cities. All the newspapers of a great city may be opposed to the vicious governing elements and yet it may avail nothing if the reformers do not go down to each polling place to organize the electors and assemble the votes, a difficult as well as a most unpleasant task, though it is the source of every Boss' peculiar power. Moreover and in addition to all this even when one campaign is successfully conducted against such elements, experience has shown that it is only a few years until the people, forgetful of their earlier wrongs, again become apathetic. Breaking ranks they disorganize and, being busily engaged again in the conduct of their private affairs in an individualistic community, they allow the administration to drift into the hands of the same classes which were but lately driven out of the offices they had so long disgraced. It seems incredible that such an evil should have developed and should continue to flourish without our finding some way to combat it. It, however, has so long been with us that it must be regarded as a rather natural if every illegitimate outgrowth of the representative system in a democracy.

This abomination has assumed an especially aggravated form in the States and cities,—the lanes and by-ways of our constitutional system. The adoption of the Federal Constitution and the development of the national government by grad-

ual process running through a long period, helped forward so greatly by the Civil War which finally disposed of the theory of State Rights, has centred popular interest in the nation to a degree which would have astounded the most ardent Federalist a hundred years ago. There are "two patriotisms" in the United States, Mr. Bryce somewhere tells us. If this is still true to-day it is a very small portion of patriotism which is reserved for Pennsylvania, or New York, or Louisiana, or Maryland. It does not thrill the average man very much to be the citizen of any particular State of the Union in comparison with the satisfaction that he feels in being a citizen of the United States—"an American". He is much more intent upon the outcome of national politics in the election of Presidents, Congressmen and other Federal officers and in watching the development of a national legislative and administrative policy. There is little interest left to be bestowed upon the States. It is not to be denied that the Bosses in the States exert a very considerable influence on the Federal government, but we have yet produced no such thing as a national Boss in the sense that we have this man in a city or a State. It is outside national politics, away from the public gaze, in the dark places of the American political system that this evil thrives.

The people seem to-day to have no general understanding or appreciation of their State governments. A citizen who could tell you the period for which Presidents, Senators and Congressmen were elected, the number of members sitting in the Federal legislature, the names of the representatives from his own district, would in all likelihood be unable to answer the same questions regarding the political organization of his State. The subject does not interest him. He does not perceive that the State now fills any important place in the system and beyond his conviction that the legislature is a source of political confusion and disturbance whenever it meets, and that it ought to be restricted as much as possible, in the exercise of its authority, his ideas on the subject are very vague. The representative system in the States is ma-

king way for the referendum; in the first place through the development of the powers of the convention which submits its constitutions to popular vote; and secondly, through the poll of the people on State and local laws which are passed along to them by the general assembly or legislature. This method of polling the people to find out what they think of a proposed legislative measure, as a means of avoiding the evils which have grown up in connection with the representative system, has been supplemented, moreover, by the development of a curious activity by local administrative boards, which are sometimes elected by the people, though many are appointed by executive and judicial officers. It is noteworthy to how great an extent judges, who have fortunately proven more incorruptible than other classes of public officials, have been saddled with extra-judicial duties, as for instance in regard to the laying out of roads and the granting of liquor licenses. By one makeshift or another, therefore, the tendency to place the responsibility upon the shoulders of new agents has gone forward until the books on American government will soon have to be rewritten.

Not only are the constitutions, with their great body of provisions and specifications in respect of so many various subjects, submitted to popular vote, as well as the amendments to these instruments, but so, too, are many acts of the legislature. Restricted as they have been to a constantly narrowing field of activity the legislatures must submit a number of matters to the vote of the people of the State, such as measures to borrow money on the State's credit, banking acts, bills to remove State capitals, etc. In one State, South Dakota, the initiative and the referendum have been introduced into the constitutional system in a more general form, *i. e.*, from this time forward *any* law which the representative legislature has passed must be submitted to the people, if a certain number of the citizens request it. And, moreover, entirely new measures may be initiated or originated by the people and these if accompanied by petitions containing a des-

ignated number of signatures must also be submitted to popular vote. If, however, no special authorization to submit a subject to the citizens is contained in the constitution the legislature of the State is without the power to call for a referendum on general State laws. To the legislature the people have delegated the law-making power and it is not competent for it to re-delegate its authority to any other body, not even to pass it back again to the people themselves. This is a well established principle in American public law.

On the other hand, respecting acts which relate to the management of the people's common affairs in the local political districts, the legislature is held to have more extensive powers. It may and does submit, without specific authorization derived from the State constitution, laws establishing the boundaries of cities, towns, counties, etc., fixing local capitals and seats of government, levying taxes and contracting loans for local purposes, exercising the police power with reference to the liquor traffic and the running-at-large of live stock, and in relation to many other different subjects. In this case the courts conceive that the legislature does not delegate its authority as a law maker, and distinctions are drawn between laws to apply to the whole State and to be voted on by the people of the whole State, and laws applying to and submitted in the separate local subdivisions of the State.

There is one limitation here which it is worth while to observe and it is this,—that it is not competent for the legislature at its pleasure to treat subjects of State and local legislation as if they were interchangeable. The legislature of Massachusetts in 1894 asked the justices of the Supreme Court of that State for their opinion upon two important questions, as follows:

"(1) Is it constitutional in an act granting to women the right to vote in town and city elections to provide that such act shall take effect throughout the Commonwealth upon its acceptance by a majority vote of the voters of the whole Commonwealth?

"(2) Is it constitutional to provide in such act that it shall take effect in a city or town upon its acceptance by a majority of the voters of such city or town?"

In this opinion a majority of the justices recognized that a law applying to the whole State referred in this manner to popular vote would in general be unconstitutional as a re-delegation of power, while, on the contrary, a law relating to a local district would usually be held to be constitutional. Nevertheless the subject of the local law must be one that lends itself properly to local treatment. Changing the conditions upon which citizens shall exercise the franchise is not a subject of this kind. Such a proposition could not be submitted in local districts, the adoption of the law being made optional with the people in their separate communities. The justices therefore answered both questions in the negative, thus calling attention to a fact which is entitled to general recognition, in order that a check may be put upon a serious abuse growing out of the confusion that has arisen in many States by reason of the legislature's disregard of plain legal distinctions of this character.

The courts have made use of two main lines of argument in justification of the submission of laws to popular vote in local districts. In the first place it is argued that a legislature may pass a law contingent upon the happening of a future event, or the fulfillment of a specified condition, *e. g.*, the arrival of a certain future date when the law is to go into effect, or the performance of some act by other parties or individuals. This condition, it is conceived, may also be a favorable vote of the people. Of this legal theory much has been made in many States, throughout a long series of important decisions, and it finds some support in several leading Federal cases.[1] If such a condition may be an affirmative vote of the people of a city or county one is impelled to ask why it may not also be a vote of the people of a State, in which case, however, the argument seems in general to have won no favor in the

[1] Cf. Cargo of the Brig Aurora *v.* United States, 7 Cranch, 382; Field *v.* Clark, 143 U. S. 649.

courts. No other impression is created by a study of the various judicial opinions bearing on this subject, in the face of such odd distinctions, than that a belief exists that a limit must be established somewhere to a practice which in the end may carry us a perilous distance away from the principles of representative government. For this reason the courts seem willing to accept the contingency theory in the one case while they reject it in the other.

As for the second argument urged in defense of the referendum on local government acts, it is developed from the fact that the legislature is in possession of extensive powers over municipalities and the local political subdivisions of the State. This theory appears to rest on a more substantial basis. The city, the county and the other local governmental districts are the creations of the State through its agent the legislature. The legislature may do with them very much as it likes except as it has been limited in plain terms by the State constitution. If it is desired that the city shall be governed by one person, or a committee of persons, it is undoubtedly its right to make such a rule and to enforce it. City, county and town affairs are administered in obedience to laws and in accord with principles which are very diverse. The legislature certainly does not go outside its constitutional bounds when it passes an act respecting local government which is to be submitted to a vote of the people. Legally it is as competent for it to put the responsibility for the management of local affairs on the shoulders of the people as a whole, as upon a mayor, a board of aldermen, a commission or any other local agency. It is argued, too, that it is expedient for the legislature to submit many local questions to popular vote, those for instance upon which the people are likely to disagree such as financial proposals and laws for the prohibition of the liquor trade. If rules are to be established by a distant authority for a local district it is in the highest sense desirable that there should be an assurance of the acquiescence of the people in them. This acquiescence is the more likely if the citizens have been allowed to vote on the subject by way of the referendum.

It is of course to be understood that the local government in its turn, through its representative legislature—city council, village trustees, etc.—may not submit its own by-laws *ad libitum* except upon authority expressly derived from the State (through the legislature or the convention). This would be a re-delegation of power for which there could be no legal justification. The municipal corporation or other local political district is a derivative creation. When it is assigned a task it can no more pass it on to another body, as for instance to the people, than can the legislature itself. The general rule that the legislature may not re-delegate the law-making power, with the well recognized exception to the rule that the submission of local government acts to popular vote is no such re-delegation of authority, however the courts may seek to justify it, is firmly grounded in the American practice.

Within a few years past the Swiss institutions, the initiative and referendum, have been studied in many lands by many men who have had many different interests to serve. Wherever in Europe, west of the German Empire, representative government has already established itself on substantial foundations the next step seems to be the referendum or plebiscite, advocated either as a corrective of evils which have developed in the representative system or as a means of helping some agitator gain his ends. In France a revolutionary group has for years urged a plebiscite on the republican constitution in the hope that the people would vote against it and the way would then be opened for another form of government. The name plebiscite in French and Italian history is at once suggestive of the plebiscites of the Napoleons, and of Victor Emmanuel during the reconstruction days in Italy, when questions of allegiance were submitted to the people under the auspices of an army of occupation, a not very certain method of securing a free expression of public opinion.[2]

[2] Cf. Maine on *Popular Government*, 2nd ed., London, 1886, pp. 65-66; A. V. Dicey, "Ought the Referendum to be Introduced into Eng-

In Belgium, when the constitution of that kingdom was recently revised, the subject of the referendum was generally discussed throughout the country. A proposition to introduce this feature of the Swiss system in a modified form into the new Belgian constitution was seriously entertained by the constituent assembly at Brussels and it led to a number of useful and thorough inquiries into the history of law-making by popular vote. By far the most important of these works by Belgian writers is *The Referendum in Switzerland,* by Simon Deploige. This excellent book is made more available to English readers by Mr. Trevelyan's translation, with the full and instructive notes by Miss Lilian Tomn.[3] The subject has been treated in a less specific way by M. de Laveleye and other eminent students of constitutional questions in Belgium.[4]

In England the subject has received not a little attention from Prof. A. V. Dicey, Mr. Lecky, Mr. Bryce, Mr. St. Loe Strachey and other writers who have approached the subject in a spirit of sincere inquiry. The leaders of the Socialist and Labor party in England have expressed an interest in the referendum also, though with different motives. In a recent parliamentary campaign the Liberal party put forward as one of its issues a "Local Veto" bill which, had it been passed, would have introduced into England the principle of allowing the people to vote in local districts on the question of prohibiting the liquor trade, in very much the same manner as in the American States. In the British Islands it is not unusual for a poll to be taken in parishes and towns on the sub-

land"? *Contemporary Review* for April, 1890; C. Borgeaud, *Histoire du Plebiscite,* 1887; Lecky, *Democracy and Liberty,* Vol. I, pp. 14-15, 38, 40, 478, 483.

[3] *Le Referendum en Suisse* par Simon Deploige, avocat, precede d'une lettre sur le Referendum en Belgique par J. Van Den Heuvel, Brussels, 1892. The English translation was published in London in 1898.

[4] Cf. *Le Gouvernement dans le Democratie,* Vol. II, pp. 146 *et seq.;* Lecky, *Democracy and Liberty,* Vol. I, p. 285; A. Le Ghait, "The Revision of the Belgian Constitution," *North American Review,* Vol. 157, p. 550.

ject of establishing free libraries or constructing water works.[5]

In Canada, where it is to be hoped this subject may soon receive the attention it deserves from some Canadian student, there is a large fund of material for a scientific treatise on the referendum. Local matters such as the issue of bonds in aid of industrial enterprises and the increase of the rates are frequently submitted to popular vote. In the Dominion, where the referendum is usually known as the plebiscite, the question of prohibiting the liquor traffic, since the passage of the "Scott Act" in 1878,[6] has frequently been submitted to the people in their local communities. More recently this subject has been referred to popular vote in the provinces. Such a plebiscite was not, in a strict sense, a reference of a law to the people but simply a device by which the legislature could acquaint itself with the popular sense. As the provincial legislature in Ontario declared, it was "desirable that opportunity should be afforded to the electors of this province to express a formal opinion as to whether or not the importation, manufacture and sale into or within this province of intoxicating liquors as a beverage should be immediately prohibited". This opinion it was conceived could be "most conveniently ascertained" through a plebiscite.[7]

In 1898 a poll of the people of the entire Dominion was taken on the subject of prohibition, again merely in an advisory way, no law being actually submitted and the government binding itself to no course or policy afterward. As in the States of the United States the Canadian legislature referred this question to the people in order to conciliate the temperance element which had begun to exert an active influence in politics. This act, known as "The Prohibition Plebiscite Act of 1898", proposed that the following question should be addressed to each voter in the Dominion: "Are

[5] For instances of local option on the liquor question in Norway see the London *Times* for April 13, 1898.

[6] 41st Victoria, chap. 16.

[7] Statutes of the Province of Ontario, 56th Victoria, p. 156.

you in favor of the passing of an act prohibiting the importation, manufacture or sale of spirits, wine, ale, beer, cider and all other alcoholic liquors for use as beverages"? to which the voter was to reply "yes" or "no" by placing a cross-mark in a space prepared for the purpose.[8] The vote is very noteworthy from the fact that it is the first attempt that has ever been made to collect the sense of the people on a subject of legislation over any territorial district of so great an area. Although plebiscites are frequently taken in the individual States of the United States we have never yet had a referendum which included all the States, embracing therefore the whole Federal area. This election cost the Dominion of Canada about $300,000,[9] and although there was a small majority on the face of the returns in favor of prohibition, all the provinces voting for the proposition except Quebec, less than 30 per cent of those entitled to vote on the subject went to the polls.[10]

The Canadian experience as to the apathy of the people on questions of legislation which are referred to them is therefore in complete harmony with our experience in the United States. Unlike the legislatures in the United States, the Parliament and legislatures in Canada may submit laws to popular vote if they consider this course to be politic and expedient. The Canadian legislatures, federal and provincial, have plenary powers. They are not in any sense delegates of the Imperial Parliament at Westminster but possess powers quite as large as those held by that body itself. The Dominion Parliament as well as the legislatures of the separate provinces may legislate conditionally, there-

[8] Acts of the Parliament of the Dominion of Canada, 61st Victoria, Vol. I, p. 219; cf. also New York *Nation* of May 5, 1898.

[9] London *Times* of Oct. 1, 1898, p. 5.

[10] A Canadian correspondent wrote to the New York *Evening Post* on the day after the election as follows: "In some cases half the electorate polled but these were exceptional. From one-fourth to a third was a more common proportion, and in some districts it fell as low as one-eighth. Many of those who did vote seemed to wander into the polling stations more by accident than by set purpose."

fore, as for instance by enacting that a law shall come into effect only on petition or vote of a majority of the electors.[11]

In the Anglo-Saxon communities in Australia and New Zealand the referendum has already gained considerable headway and it seems likely to enjoy a much greater development within the next few years.[12] The same principle has lately had several applications in the course of the efforts which have been made to bring the various colonies together in a Federal Union, a result that is now at last assured. It was even proposed when the Commonwealth Bill was being discussed that the referendum should be incorporated in the Federal Constitution as a permanent feature, under definite limitations, of the new government.

In our own Republic the reform has recently been given a great impetus by reason of the admiration which has been expressed for Switzerland's example. This result has been induced in some degree by a study of the subject by a large number of competent writers on constitutional questions,[13]

[11] Cf. A. H. F. Lefroy, *The Law of Legislative Power in Canada*, Toronto, 1898, pp. 244-59, 495-96; New York *Nation* of May 5, 1898.

[12] Cf. Miss Lilian Tomn, "The Referendum in Australia and New Zealand", *Contemporary Review*, Vol. 72, p. 242.

[13] Cf. J. M. Vincent, *State and Federal Government of Switzerland*, Baltimore, 1891; A. L. Lowell, *Governments and Parties in Continental Europe*, 1896, Vol. II, pp. 240 *et seq.*, and "The Referendum in Switzerland and America", *Atlantic Monthly* for April, 1894, p. 517; E. L. Godkin, *Some Unforeseen Tendencies of Democracy*, 1898, pp. 138 *et seq.*; J. R. Commons, *Proportional Representation*, 1896, pp. 186 *et seq.*; G. Bradford, *The Lesson of Popular Government*, Vol. II, pp. 189 *et seq.*; A. B. Hart, "Vox Populi in Switzerland", New York *Nation*, Vol. 59, p. 193; New York *Nation*, Vol. 58, p. 206. The leading writings and works in other countries on this subject, which may be profitably consulted by the student are: Adams and Cunningham, *The Swiss Confederation*, London, 1889; W. E. H. Lecky, *Democracy and Liberty*, London, 1896, Vol. I, pp. 277 *et seq.*; Maine on *Popular Government*, 1886, pp. 41, 68, 95-6; E. A. Freeman, *Growth of the English Constitution*, chap. 1, for an account of the Swiss Landsgemeinde; C. B. Roylance-Kent in *MacMillan's Magazine*, Vol. 69, p. 15; *National Review* for February, March and April, 1894; London *Spectator*, Vol. 72, p. 188, and Vol. 73, pp. 234, 494; Speech by Mr. A. J. Balfour reported in the London *Times* of Feb. 5, 1894; A. V. Dicey, "The Defence of the Union" *Contemporary Review*, Vol. 61, p. 314; S. Deploige,

but it has been chiefly encouraged by a popular political movement in the West of far-reaching proportions. A demand for the introduction of the initiative and the referendum into the practice of the United States is to be found in the "platforms" of a party which has lately made itself a dominating force in a number of States. There are "Direct Legislation Leagues". Articles on this subject are constantly appearing in newspapers and magazines which are devoted to radical social and political reforms. Large classes of the population seem to have become imbued with the idea that if the people should once secure the privilege of originating and adopting their own laws all other difficulties would vanish away. A "Convention" attended by more than 500 delegates was recently held in Ohio at which a full list of State officers was nominated upon a platform of a single "plank": "Direct legislation under the system known as the initiative and the referendum."

The initiative and the referendum, called by these names, as a result of this movement, have been introduced into South Dakota with respect to all laws passed by the State legislature, as well as by the local municipal legislatures; in Nebraska with respect to laws passed by the State legislature in reference to localities; and in San Francisco, by the new charter, with respect to city by-laws. These recent manifestations of interest in an imported institution real students of American government will regard with less favor than were the same interest expressed for the more natural outgrowths of our town-meeting system. I think it has been sufficiently well indicated by this time to what a degree of development the initiative and the referendum or plebiscite have attained in

op. cit.; J. Signorel, *Etude de legislation comparée sur le referendum legislatif*, Paris, 1896, a work of 470 pages "crowned" by the Faculté de Droit of Paris in 1894; Borgeaud, *Etablissement et Rèvision des Constitutions*, Paris, 1893; Saleilles in *Revue du Droit Public*, September-October, 1894, pp. 345 *et seq.*; Numa Droz, *Etudes et Portraits Politiques*, Geneva, 1895, and "The Referendum in Switzerland" in the *Contemporary Review* of March, 1895; E. de Laveleye, *op. cit.*, Vol. II, pp. 146 *et seq.*

this country by a natural historical evolution. The referendum on State Constitutions, beginning with Massachusetts and New Hampshire, and spreading over the entire Union; the poll of the people on calling a convention to revise the constitution and on constitutional amendments proposed by the legislature; the referendum on propositions to make loans on the credit of the State, on banking acts and laws to change the sites of State capitals; the referendum on local government acts, financial propositions and "local option" laws in respect of the sale of liquors and the running at large of domestic animals—these are all the outgrowths of a natural movement which can be traced down historically step by step from the New England town-meeting. Again, the petition for an election on "prohibition" or on a proposition to issue bonds, which has had a place in the American system of local government for many years, is the initiative in the same form in which it to-day occurs in Switzerland. We do not need to go outside of our own national borders for the material for a work upon the initiative and the referendum. It exists in America in abundance,[14] and if the system of submitting laws to popular vote shall be destined to enjoy a still greater development in this country it would be much safer and much more legitimate were we to draw more freely upon the native experience instead of turning all the while to another land in which social and political conditions are necessarily very different from our own. At this day it will be found to be no wiser to introduce strange features into the government than it proved to be in Pennsylvania in 1776. Whatever is of greatest value in a government and, especially true is this maxim in reference to democratic government, is that which flows naturally out of a people's experience. They are accustomed to types and forms. They have social and political habits which are grounded in deep-rooted racial traits. To disregard the teachings of history in this respect

[14] The Canadian plebiscite is also a natural development without connection with the Swiss influence.

is to invite social friction which may lead to serious disorders as experience with government running through many centuries tends abundantly to show.

Whatever may be the future of the initiative and the referendum in the American States it will always be necessary to take account of several basic facts of which great bodies of the people seem often to be unmindful. These are of various sorts, but they may all be resolved into one primary fact which has to do with the manifest inequality of men. All men are clearly not endowed with the political genius to an equal degree. All are not equally intelligent, moral or capable. The whole social and economic order testifies to this inequality, as do our biological progress and evolution which go forward only because of the existence of this important fundamental principle. We know very well that over and against this natural principle is set a great deal of humanitarian sentiment which sometimes has taken one form and sometimes another. It was this sentiment manifesting itself through Rousseau and the philosophy which was the forerunner of the French Revolution. It is this sentiment that is at the bottom of the great social upheaval which to-day threatens the world, and which in one country, as in Germany, may become a demand for sweeping economic reforms and in another, where the popular disposition is less academic and speculative, for some superficial political reform. Elements in the American population, which are more or less the same, have repeatedly organized political parties to secure paper money, silver money, to prohibit the liquor trade, to enfranchise women, to combat large associations of capital in industry, to tax the rich, and when thwarted in their purposes by the Federal Supreme Court to abolish or curtail the powers of that august body. These dissatisfied groups of persons impelled by the American character for superficiality and the desire to attain results by sudden applications of energy to some one particular end have more recently turned their attention to the system of law-making in general, and, quite as vehemently and apparently as full of conviction as before, they announce that they

have at last found the true source of their troubles in the representative principle. Acts are passed that are an offense to the people and many subjects upon which there should be legislation are entirely neglected by the people's delegates. Therefore the initiative and the referendum should be imported from Switzerland in order to re-establish the principles of justice and insure the future happiness of the state. Such a line of thought must manifestly rest upon an assumption that laws are of an exaggerated potency in making the citizens prosperous, a view which has long been fostered in the United States by the protective tariff campaigns.

It was Rousseau who desired to simplify government and legislate by an unchecked convention in order to bring the state back to a condition as near as possible to that ideal original form in which the citizens met together under an oak tree and made their own laws. John Adams and other patriots in this country successfully combatted such theories in the American States and organized a government of checks and balances. In all States where universal suffrage has been introduced there is a certain presumption of human equality and we usually grant the theory a good deal of indulgence in the belief that democracy is, for us at least, the most expedient and perhaps the only practicable form of government. We in America, however, have so organized the state that the people as a mass do not draft their own laws, or generally adopt them. They do not in a body execute or administer the laws; nor again do they interpret them and adjust conflicting interests in the courts of justice. All these functions adhere to representatives whom the people themselves elect, or who are chosen at second hand by agents which the people directly elect. We look to the people under our system so to organize themselves in their various local districts, neighbors with neighbors, that they will choose to represent them men of more than average capability and men who can creditably represent them. All the stockholders of a private company, or the members of a private

association or a church are not fitted equally well to conduct its affairs. It should be a matter of pride with them, however, as well as a matter of self-interest, that the very best men available for the service should be put forward into places of responsibility and leadership. This is what we have assumed would occur in each political precinct under the representative system to the end that the wisest men and the most honest men, having been returned from each community, would co-operate in the work of public management. That we are a long way from having realized our hopes and dreams it takes no extraordinary insight to perceive. We are now offered the initiative and the referendum as correctives for the evils that have developed in the system of government by representatives in two ways, as these institutions have come down to us by natural evolution and as a foreign importation recommended to us by Switzerland.

Judge Jameson writing of this subject, now a number of years ago, and alluding to the submission of the work of the constitutional conventions to popular vote, suggested the advisability of bringing the people into the system as their own law-makers to a still greater extent. He observed that "the people acting as legislators need the antecedent ministry of intelligent and skilful committees to gather and to embody in fitting forms their collective sense. Our conventions are simply committees of such a kind. And if we look closely into the principles of legislation the fact that the people never legislate in a single body, but in groups assembled in separate districts, not to debate but to vote upon the measures proposed to them does not constitute a radical difference between them and a legislature. The latter might enact the statute law in the same way; and to those familiar with the practices of such bodies it may be doubtful whether legislation so conducted would not be more honest, if not more intelligent than it is now." [15]

Mr. Bryce in reviewing the disadvantages of direct legislation by the people in general arrives at a very similar con-

[15] *Op. cit.*, pp. 529-30.

clusion with reference to the United States. He says: "These considerations [touching the manifest incapacity of crowds to make their own laws] will to most Europeans appear decisive against it. The proper course they will say is to improve the legislatures. The less you trust them the worse they will be. They may be ignorant; yet not so ignorant as the masses. But the improvement of the legislatures is just what the Americans despair of, or as they would prefer to say, have not time to attend to. Hence they fall back on the referendum as the best course available under the circumstances of the case and in such a world as the present. They do not claim that it has any great educative effect on the people. But they remark with truth that the mass of the people are equal in intelligence and character to the average state legislator and are exposed to fewer temptations."[16]

And again in another connection Mr. Bryce says:

"It would doubtless be better if good legislatures were attainable to leave the enactment of what are really mere statutes to the legislature, instead of putting them in a constitution. But if good legislatures are unattainable, if it is impossible to raise the senate and the house of each State above that low level at which they now stand, then the system of direct popular action may be justified as a salutary effort of the forces which make for good government, opening for themselves a new channel."[17]

Mr. E. L. Godkin in an essay on "The Decline of Legislatures" says: "Democracies do not admit that legislatures such as we see them are the last thing they have to try. They seem to be getting tired of the representative system. In no country is it receiving the praises it received forty years ago. There are signs of a strong disposition, which the Swiss have done much to stimulate, to try the referendum . . . Inasmuch as all important matters devised by the convention are submitted to the people with eminent success there is no reason

[16] *Op. cit.*, Vol. I, p. 472.
[17] *Ibid.*, p. 476.

why all grave measures of ordinary legislation should not be submitted also."[18]

I may say again in concluding this chapter what I said at its beginning. The final result of the development, in the midst of which we now are no one can predict with confidence. Though the evils of the representative system are admittedly great the fact must be kept in mind that direct legislation by the people is also attended by abuses of a very serious kind. So far as our experience has already gone in the United States a number of glaring defects have been exhibited by the people in their role as law-makers. The most impressive of these is their strange apathy even in the face of great issues. They as a mass have so little interest in legislative subjects that only a small percentage will attend the polls for special elections and at general elections when individual candidates are to be chosen, though the propositions be printed on the same ballots with the names of the candidates, a large proportion of the voters will not put themselves to the slight trouble of placing a pencil mark under the word "yes" or "no". The conclusion is unavoidable that the people considered as a body do not know anything, nor do they care anything about the merits or demerits of a particular law. They may know little in the opinion of most of us about the respective merits of candidates for representative offices. For one reason or another, however, the people still have enough interest in this subject to record their preferences. It is true that the largest possible vote is never polled for candidates, but, speaking roughly, twice as many electors

[18] *Unforeseen Tendencies of Democracy*, pp. 138, 143; cf. A. V. Dicey, "Will the Form of Parliamentary Government be Permanent?" *Harvard Law Review*, Vol. XIII, pp. 67 *et seq.*; "Ought the Referendum to be Introduced into England?" *Contemporary Review*, April, 1890, and "The Referendum", *National Review* for March, 1894; Lecky, *Democracy and Liberty*, Vol. I, pp. 277 *et seq.*; E. V. Raynolds, "The Referendum and Other Forms of Direct Democracy in Switzerland", *Yale Review*, Vol. I, p. 289; "The Referendum in America", London, *Spectator*, Vol. 71, p. 904; "The Decline of Legislatures", London *Economist* of June 11, 1898.

vote for individuals as vote for measures. Furthermore, very strange popular idiosyncrasies are developed at elections on propositions. When several are submitted at the same time all are likely to be defeated, or else all adopted. There seems to be little capacity for discrimination. Again very radical measures and many indeed of dangerous tendencies are not always rejected by the people, or if they are there are not a few cases in which this result seems to have been brought about by accident rather than by serious moral purpose. It is easy to see on a most cursory examination that under such circumstances the people are very far from being an ideal body of law-makers.

It is proper to keep the fact in mind, however, that the initiative and the referendum, as we know them, are under check and restraint and we are a long way from government by the masses, even in South Dakota, where the principle has been carried to its greatest length. Whether the referendum is authorized by the convention or the legislature, the measure is framed or proposed by a representative body of limited membership. The people are merely vetoers or ratifiers, and although their rights with respect to constitutional law are very comprehensive in no case are their powers general regarding ordinary statute law. In the worst case, if the submission is not made on express authority of the legislature, there must be presented a petition which contains the signatures of at least five per cent of the qualified voters of the State. To assemble the names of so many citizens, as experience will show, is not so easy a task as it may appear. When we are asked, therefore, to declare ourselves for the representative system or for unbridled popular rule the question, in so far as it has to do with the initiative and the referendum,—at any rate as these institutions have been developed in this country—is beside the mark. The referendum will not supplant the representative system, though it has been and may still be an influence to modify this system in a very material way. Whether we approve of the

principle *per se* or disapprove of it, it is something that has fastened itself securely upon our constitutional practice and it appears to be assured of a much more extended development in the immediate future. One cannot escape the thought, therefore, that there may be compensations in the method, at any rate with regard to local government and that it may at least not be an agency to make our system, already bad, in any essential respect the worse. If this may seem like modest praise it is perhaps the natural conclusion of this volume which is not a *Tendenzwerk,* but an unvarnished historical account of some important developments in the field of popular government in the United States of America.

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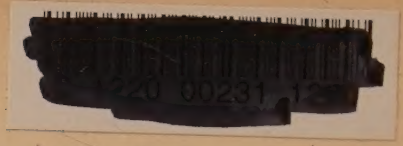

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